Senate Select Committee on Intelligence

Committee Study of the Central Intelligence Agency's Detention and Interrogation Program

Minority Views

Additional Minority Views

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MINORITY VIEWS OF VICE CHAIRMAN CHAMBLISS JOINED BY SENATORS BURR, RISCH, COATS, RUBIO, AND COBURN[1]

(U) EXECUTIVE SUMMARY

(U) In March 2009, the Senate Select Committee on Intelligence ("SSCI" or "Committee") decided, by a vote of 14-1, to initiate a *Study of the Central Intelligence Agency's Detention and Interrogation Program,* (the Study).[2] On August 24, 2009, Attorney General Eric Holder decided to re-open the criminal inquiry related to the interrogation of certain detainees in the Central Intelligence Agency's (CIA) Detention and Interrogation Program ("the Program" or "the Detention and Interrogation Program").[3] Shortly thereafter, the minority withdrew from active participation in the Study when it determined that the Attorney General's decision would preclude a comprehensive review of the Program, since many of the relevant witnesses would likely decline to be interviewed by the Committee. Three years later, on August 30, 2012, Attorney General Holder closed the criminal investigation into the interrogation of certain detainees in the Detention and Interrogation Program.[4] At the end of the 112th Congress, on December 13, 2012, the Committee approved the adoption of the Study's three-volume report, executive summary, and findings and conclusions by a vote of 9-6.[5] On April 3, 2014, by a vote of 11-3, the Committee approved a motion to send updated versions of the Study's executive summary and findings and conclusions to the President for declassification review.[6]

(U) The latest version of the updated Study is a [[6,682]]-page interpretation of documents that, according to the CIA, has cost the American taxpayer more than 40 million dollars and diverted countless CIA analytic and support resources.[7] Contrary to the Terms of Reference, the Study does not offer any recommendations for improving intelligence interrogation practices, intelligence activities, or covert actions. Instead, it offers 20 conclusions, many of which attack the CIA's integrity and credibility in developing and implementing the Program. Absent the support of the documentary record, and on the basis of a flawed analytical methodology, these problematic claims and conclusions create the false impression that the CIA was actively misleading policy makers and impeding the counterterrorism efforts of other federal government agencies during the Program's operation.

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[1] The following members of the Committee signed on to the minority views drafted in response to the original Study approved by the United States Senate Select Committee on Intelligence on December 13, 2012: Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Blunt, and Rubio. [[Please note that the double-bracketed text in this document is new explanatory text necessitated by substantive modifications to the Study's Executive Summary and Findings and Conclusions that were made ***after*** our June 20, 2014, Minority Views were submitted to the Central Intelligence Agency for the declassification review. We also note that these Minority Views are in response to, and at points predicated upon, the research and foundational work that underlie the Study's account of the CIA Detention and Interrogation Program. These Views should not be treated as an independent report based upon a separate investigation, but rather our evaluation and critique of the Study's problematic analysis, factual findings, and conclusions.]]

[2] SSCI Transcript, *Business Meeting to Discuss and Revote on the Terms of Reference for the Committee's Study of the CIA's Detention and Interrogation Program,* March 5, 2009, p. 10 (DTS 2009-1916).

[3] DOJ, *Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees,* August 24, 2009, p. 1.

[4] *See* DOJ, *Statement of Attorney General Eric Holder on Closure of investigation into the Interrogation of Certain Detainees,* August 30, 2012, p. 1.

[5] SSCI Transcript, *Business Meeting to Consider the Report on the CIA Detention and Interrogation Program,* p. 74 (DTS 2013-0452).

[6] SSCI Transcript, *Hearing to Vote on Declassification of the SSCI Study of the CIA's Detention and Interrogation Program,* April 3, 2014, pp. 8-9 (DTS 2014-1137).

[7] CIA, Letter from V. Sue Bromley, Associate Deputy Director, November 6, 2012, p. 1 (DTS 2012-4143).

(U) THE STUDY'S FLAWED PROCESS

(U) We begin with an examination of the procedural irregularities that negatively impacted the Study's problematic claims and conclusions. First, the Committee's decision not to interview key witnesses led to significant analytical and factual errors in the original and subsequent updated versions of the Study. Second, over the objection of the minority, the Committee did not provide a copy of the draft Study to the Intelligence Community for initial fact-checking prior to the vote to adopt the Study at the end of the 112th Congress. Third, Committee members and staff were not given sufficient time to review the Study prior to the scheduled vote on December 13, 2012. Fourth, the Committee largely ignored the CIA's response to the Study on June 27, 2013, which identified a number of factual and analytical errors in the Study. Fifth, during the summer and early fall of 2013, SSCI majority staff failed to take advantage of the nearly 60 hours of meetings with some of the CIA personnel who had led and participated in the CIA's study response. Instead of attempting to understand the factual and analytical errors that had been identified by the CIA, the majority staff spent a significant portion of these meetings criticizing the CIA's study response and justifying the Study's flawed analytical methodology. Sixth, the production and release of the updated Study was marred by the alleged misconduct of majority staff and CIA employees in relation to a set of documents known as the "Panetta Internal Review." Finally, Committee members and staff were not given sufficient time to review the updated Executive Summary and Findings and Conclusions prior to the scheduled vote on April 4, 2014.

(U) With the exception of the decision not to interview relevant witnesses, most, if not all, of these procedural irregularities could have been avoided. As will be seen below, the updated Study still contains a significant number factual inaccuracies and invalid claims and conclusions. We believe that many of these problems could have been corrected if the Committee had simply adhered to our established procedural precedents for a report of this importance.

(U) THE STUDY'S PROBLEMATIC ANALYSIS

(U) We found a number of analytical deficiencies in the Study beginning with an inadequate discussion of the context that led to the implementation and operation of the CIA's Detention and Interrogation Program. Also, as an oversight body, this Committee reviews the Intelligence Community's analytic products with an expectation that they will follow certain analytic integrity standards. While these standards do not technically apply to this Committee's oversight products, the values behind these standards are useful in assessing our own analytic tradecraft. When applied to the Study, these standards were helpful in identifying some of the Study's general analytic deficiencies concerning objectivity, independence from political considerations, timeliness, the use of all available intelligence sources, and consistency with proper standards of analytic tradecraft.

(U) Inadequate Context

(U) The Study does very little to provide the context in which the CIA's Detention and Interrogation Program was initiated and operated. It is entirely silent on the surge in terrorist threat reporting that inundated the Intelligence Community following the September 11, 2001, terrorist attacks by al-Qa'ida. It also makes no mention of the pervasive, genuine apprehension about a possible second attack on the United States that gripped the CIA in 2002 and 2003. During our review of the documentary record, we could clearly discern a workforce traumatized by the thousands of lives lost as a result of the September 11, 2001, terrorist attacks, but also galvanized by the challenge of working to ensure such an attack never occurred again.

(U) Inadequate Objectivity

(U) With respect to the standard of objectivity, we were disappointed to find that the updated Study still contains evidence of strongly held biases. John Brennan emphasized this point prior to his confirmation as the Director of the CIA, when he told Vice Chairman Chambliss that, based on his reading of the originally approved Executive Summary and the Findings and Conclusions, the Study was "not objective" and was a "prosecutor's brief," "written with an eye toward finding problems." We agree with Director Brennan's assessments. We also agree with the criticism he relayed from Intelligence Community officials that it was written with a "bent on the part of the authors" with "political motivations."

(U) We found that those biases led to faulty analysis, serious inaccuracies, and misrepresentations of fact in the Study. For example, the Study states, "At no time during or after the aggressive interrogation phase did Abu Zubaydah provide the information that the CIA enhanced interrogation were premised upon, specifically, 'actionable intelligence about al-Qa'ida operatives in the United States and planned al-Qa'ida lethal attacks against U.S. citizens and U.S. interests.'"[8] Specifically, our review of the documentary record revealed that Abu Zubaydah provided actionable intelligence, after he was subjected to "aggressive" interrogation in April[9] and August[10] 2002, that helped lead to the capture of Ramzi bin al-Shibh and other al-Qa'ida associates during the Karachi safe house raids conducted on September 10-11, 2002. These captures effectively disrupted the al-Qa'ida plot to bomb certain named hotels in Karachi, Pakistan, that had been selected because they were frequented by American and German guests.

(U) The Study's lack of objectivity is also evidenced by the uneven treatment of key U.S. officials throughout the report, attacking the credibility and honesty of some, while making little mention of others. For example, former Director George Tenet led the CIA at the outset of the Program, during a period the Study contends was characterized by mismanagement. Tenet authorized the enhanced interrogation techniques, and if the Study is to be believed, headed an organization that withheld information from and misled policymakers in the executive branch and Congress. He is mentioned 62 times in the updated version of the Study's Executive Summary. By comparison, former Director Michael Hayden—who joined the CIA in 2006, after all but two detainees entered the Program and the most severe EITs were no longer in use—is mentioned over 200 times in the Executive Summary and disparaged numerous times. Notably, he was also the only Director to brief the Program to all members of the congressional oversight committees.

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[8] SSCI Study, Volume I, March 31, 2014, p. 146.

[9] *See* SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, June 20, 2014, p. 33.

[10] *See* CIA, [redacted] 10586, August 4, 2002, pp. 2-5.

(U) Indications of Political Considerations

(U) Ideally, oversight reports should not be distorted or altered with the intent of supporting or advocating a particular policy, political viewpoint, or specific audience."[11] We found indications of political considerations within the Study. For example, the Study uses out-of-context quotes from certain minority members to suggest incorrectly that they supported certain positions taken by the Study. The Study omits additional comments by these same members which contradict the out-of-context statements.

(U) Lack of Timeliness

(U) The analytic integrity standard of timeliness centers on the need to effectively inform key policy decisions. The same could be said for intelligence oversight reports. The updated version of the Study was released for declassification review on April 3, 2014—more than five years after the Terms of Reference were approved. No version of the Study, updated or otherwise, has ever contained any recommendations. Moreover, there are no lessons learned, nor are there any suggestions of possible alternative measures. This absence of Committee recommendations is likely due to the fact that the key policy decisions about the CIA's Detention and Interrogation Program were decided by President Obama in 2009. Since it does little to effectively inform current policymakers, we found that the Study is not timely.

(U) Inadequate Use of Available Sources of Intelligence

(U) Despite the millions of records available for the Study's research, we found that important documents were not reviewed and some were never requested. We were surprised to learn that the e-mails of only 64 individuals were initially requested to support the review of a program that spanned eight years and included hundreds of government employees. Committee reviews of this magnitude typically involve interviewing the relevant witnesses. Here, these relevant witnesses were largely unavailable due to the Attorney General's decision to re-open a preliminary criminal review in connection with the interrogation of specific detainees at overseas locations. When DOJ closed this investigation in August 2013, however, the Committee had a window of opportunity to invite these relevant witnesses in for interviews, but apparently decided against that course of action. The lack of witness interviews should have been a clear warning flag to all Committee members about the difficulty of completing a truly "comprehensive" review on this subject.

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[11] Intelligence Community Directive Number 203, *Analytic Standards* (effective June 21, 2007), p. 2.

(U) Poor Standards of Analytic Tradecraft

(U) We found numerous examples of poor analytic tradecraft in the Study. There were instances where the Study did not accurately describe the quality and reliability of the sources of information supporting its analysis. For example, the Study states that a review by the CIA Inspector General (IG) "uncovered that additional unauthorized techniques were used against" a detainee, but the Inspector General report actually said it "heard allegations" of the use of unauthorized techniques and said, "[F]or all of the instances, the allegations were disputed or too ambiguous to reach any authoritative determination about the facts."[12] The Study rarely included caveats about uncertainties or confidence in its analytic judgments. Many of the Study's conclusions and underlying claims are offered as matters of unequivocal fact. As an example, the Study asserts "CIA officers conducted no research on successful interrogation strategies during the drafting of the [Memorandum of Notification], nor after it was issued."[13] Proving a negative is often very difficult, and in this particular case it is difficult to understand how such an absolute assertion can be made without interviewing the affected witnesses or even citing to one documentary source that might support such a claim.

(U) The Study also engaged in little alternative analysis of its claims and conclusions. In many respects, these minority views provide this necessary alternative analysis. For example, the Study is replete with uncited and absolute assertions like "there is no indication in CIA records that Abu Zubaydah provided information on bin al-Shibh's whereabouts."[14] Our review of the documentary record revealed that Abu Zubaydah did provide locational information about bin al-Shibh. As discussed below, Zubaydah made four separate photographic identifications of bin al-Shibh and placed him in Kandahar, Afghanistan, during the November to December 2001 timeframe and provided sufficient information for interrogators to conclude that bin al-Shibh was subsequently with Khalid Shaykh Mohammad (KSM) in Karachi, Pakistan.[15]

(U) Finally, we found instances where claims were supported more by rhetorical devices than sound logical reasoning. For example, in support of the Study's conclusion that the CIA's use of enhanced interrogation techniques were not effective, the Study stated:

> At least seven detainees were subjected to the CIA's enhanced interrogation techniques almost immediately after being rendered into CIA custody, *making it impossible to determine* whether the information they provided could have been obtained through non-coercive debriefing methods."[16]

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[12] *Compare* SSCI Study, Volume I, March 31, 2014, p. 229 *with* CIA Office of Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 - October 2003)*, May 7, 2004, p. 41 (DTS 2004-2710). [[This tradecraft error was partially corrected in the November 26, 2014, version of the Executive Summary by editing the offending sentence to read, "The Office of Inspector General later *described* additional *allegations* of unauthorized techniques used against . . . ." (emphasis added). *Compare* SSCI Study, Executive Summary, April 3, 2014, p. 67 *with* SSCI Study, Executive Summary, December 3, 2014, p. 70.]]

[13] SSCI Study, Volume I, March 31, 2014, p. 20.

[14] SSCI Study, Executive Summary, December 3, 2014, p. 318.

[15] *See* SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, June 20, 2014, pp. 37-38.

[16] SSCI Study, Findings and Conclusions, April 3, 2014, p. 2 (emphasis added). [[This false reasoning was tempered in the December 3, 2014, version of the Executive Summary by editing the sentence to read, "CIA

This statement is a rhetorical attempt to persuade the reader that non-coercive techniques may have been equally or even more successful than the enhanced techniques. It is little more than an appeal to unknowable facts and is not based upon logical reasoning.[17]

(U) ERRONEOUS STUDY CONCLUSIONS

(U) Despite the fact that the CIA response and the summer staff meetings essentially validated our criticisms of the original Study, it appears that the updated version of the Study largely persists with many of its erroneous analytical and factual claims. We have used these past eleven weeks to update our own Minority Views and focus our attention on eight of the Study's most problematic conclusions.

(U) Conclusion 1 (The CIA's use of enhanced interrogation techniques was not effective)

(U) This updated conclusion asserts that the "CIA's use of enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees."[18] The Study attempts to validate this conclusion by relying upon four faulty premises. The first faulty premise is that "seven of the 39 CIA detainees known to have been subjected to the CIA's enhanced interrogation techniques produced no intelligence while in CIA custody."[19] If true, that means that 82 percent of detainees subjected to enhanced interrogation techniques produced some intelligence while in CIA custody, which is better than the 57.5 percent effectiveness rate of detainees not subjected to enhanced interrogation techniques. Regardless, these statistics do not provide any real insight on the *qualitative* value of the intelligence information obtained. The true test of effectiveness is the value of *what* was obtained—not how much or how little was obtained.

(U) We have already discussed the second faulty premise, which involves a rhetorical appeal to ignorance based on the fact that at least seven detainees were subjected to enhanced interrogation techniques almost immediately after coming into the CIA's custody. Such speculation is not helpful in assessing whether the enhanced interrogation techniques were effective.

(U) The third faulty premise of this ineffective techniques conclusion focuses on the fact that "multiple" detainees subjected to enhanced interrogation techniques "fabricated information, resulting in faulty intelligence."[20] Our documentary review also found that "multiple" detainees

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detainees who were subjected to the CIA's enhanced interrogation techniques were usually subjected to the techniques immediately after being rendered to CIA custody. Other detainees provided significant accurate intelligence prior to, or without having been subjected to these techniques." *Compare* SSCI Study, Findings and Conclusions, April 3, 2014, p. 2 *with* SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.]]

[17] For a more detailed analysis of this unsupported claim, *see infra,* SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, December 5, 2014, p. 22.

[18] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2. The first and second conclusions in the updated Findings and Conclusion had been combined in Conclusion 9 of the original Study.

[19] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2. The assertion of "produced no intelligence" as used by the Study reflects that the interrogations of these detainees resulted in no intelligence reports.

[20] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.

who were not subjected to enhanced interrogation techniques also provided fabricated information to their interrogators. The only real inference that can be drawn from these facts is that detainees fabricated information regardless of whether they were subjected to enhanced interrogation.

(U) The final faulty premise used in support of this "effectiveness" conclusion was that "CIA officers regularly called into question whether the CIA's enhanced interrogation techniques were effective, assessing that the use of the techniques failed to elicit detainee cooperation or produce accurate intelligence."[21] While the *opinions* of these unidentified CIA officers may happen to coincide with the Study's first conclusion, there were at least three other CIA officials who held the opposite view—Directors Tenet, Goss, and Hayden.

(U) Conclusion 2 (CIA's Justification for EITs Rested on Inaccurate Effectiveness Claims)

(U) Conclusion 2 states, "[t]he CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness."[22] While our review of the documentary record did reveal some instances of inaccurate effectiveness claims by the CIA, we found that many of the Study's claims related to this conclusion were themselves inaccurate. We reviewed 17 of the 20 cases studies that the Study relies upon to support this flawed conclusion. We examined these case studies in logical groupings (e.g., related to information provided by Abu Zubaydah) using chronological order rather than the Study's confusing "primary" and "secondary" effectiveness representations. This approach helped us better understand how the intelligence resulting from these detainee interrogations was used by the CIA to disrupt terrorist plots and identify, capture, and sometimes prosecute other terrorists.

(U) The Study developed an analytical methodology to examine the effectiveness of the information obtained from the CIA's Detention and Interrogation Program that we found to be both confusing and deeply flawed. Usually, effectiveness is measured by establishing performance metrics that require the collection of pertinent data and the subsequent analysis of such data. For example, in the context of counterterrorism such metrics might include: (1) increased understanding of terrorist networks; (2) identification of terrorists and those providing material support; (3) terrorist captures; (4) terrorist interrogations; (5) disruption of terrorist operations and financing; (6) disruption of terrorist recruitment; (7) reduction in terrorist safe-havens; (8) development of counterterrorism assets; (9) intelligence gathering of documents, computer equipment, communications devices, etc.; (10) improved information sharing; and (11) improved foreign liaison cooperation against terrorism. Such metrics could then be compared against the information provided by CIA detainees to assess the relative effectiveness of the Program.

(U) Instead of performance metrics, the Study's analytical methodology creates artificial categories that are used to *exclude* certain detainee information from being considered in an effectiveness assessment of the Program. For example, if the Study found that a detainee subjected to enhanced interrogation had provided similar information during an earlier non-enhanced interrogation, then such information could not be used for assessing the effectiveness of the program. This category appears to have been developed in an attempt to exclude much of the intelligence information provided by Abu Zubaydah after he was subjected to enhanced interrogation in August 2002, since some of the information Abu Zubaydah provided during those interrogations was similar to information he had provided prior to August. However, it turns out that this category is largely inapplicable to Abu Zubaydah's case, because he was subjected to enhanced interrogation by the CIA when he was released from the hospital on April 15, 2002.[23]

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[21] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.
[22] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.

(U) Another category of information that the Study's flawed analytical methodology excludes is corroborative information. If a detainee subjected to enhanced interrogation provided information that was already available to the CIA or other elements of the Intelligence Community from another source, then the methodology dictates that such information cannot be considered to support a CIA effectiveness representation. This result occurs even in situations in which the detainee's information clarified or explained the significance of the prior information. Another exclusion category applies if the Study determined that there was no causal relationship between the information obtained from a detainee after the use of enhanced interrogation and the operational success claimed by the CIA. In these case studies, we often found documentary evidence that supported direct causal links between such detainee information and the operational success represented by the CIA. The final category excludes detainee information about terrorist plots when there was a subsequent assessment by intelligence and law enforcement personnel that such plots were infeasible or never operationalized.

(U) This flawed analytical methodology often forced the Study to use absolute language such as, "no connection," "no indication," "played no role," or "these representations were inaccurate." Our review of the documentary record often found valid counter-examples that disproved such absolute claims. We also found that when we invalidated the claims in the initial case studies, there was often a cascading effect that further undermined claims in the subsequent case studies. Here we summarize the claims for the case studies we examined and our alternate analysis of those claims.

(U) *The Identification of Khalid Shaykh Mohammad as the Mastermind of the 9/11 Attacks and His "Mukhtar" Alias*

~~(TS~~[redacted]~~NF)~~ We combined our analysis of these two case studies because they share common facts and analytical issues. The Study claims that "[o]n at least two prominent occasions, the CIA represented, inaccurately, that Abu Zubaydah provided [information identifying KSM as the mastermind of 9/11] after the use of the CIA's enhanced interrogation techniques."[24] We found that neither of the occasions cited with respect to the "Mastermind of 9/11" information were "prominent." The first occasion was not even a CIA representation, but rather a mistake made by the Department of Justice in one of its legal opinions.[25] The second occasion involved a set of November 2007 documents and talking points for the CIA Director to use in a briefing with the President. Although these briefing materials did contain some erroneous information about KSM's interrogation, the Study fails to demonstrate whether this erroneous information was actually briefed to the President during that timeframe.[26]

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[23] *See infra,* SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, December 5, 2014, pp. 33-37.

[24] SSCI Study, Executive Summary, December 3, 2014, p. 312.

[25] *See* SSCI Study, Executive Summary, December 3, 2014, p. 313, n.1748.

~~(TS~~[redacted]~~NF)~~ The Study also claims that "[i]n at least one instance in November 2007 . . . the CIA asserted that Abu Zubaydah identified KSM as 'Mukhtar' after the use of the CIA's enhanced interrogation techniques."[27] However, this instance is no more "prominent" than the above "mastermind" occasion, because it was contained in the same November 2007 briefing materials used by the CIA Director to brief the President.[28] Again, the Study fails to demonstrate whether this erroneous information was actually briefed to the President during this timeframe.

~~(TS~~[redacted]~~NF)~~ The Study's third claim in relation to this case study is that "[t]here is no evidence to support the statement that Abu Zubaydah's information—obtained by FBI interrogators prior to the use of the CIA's enhanced interrogation techniques and while Abu Zubaydah was hospitalized—was uniquely important in the identification of KSM as the 'mastermind' of the 9/11 attacks."[29] We found considerable evidence that the information Abu Zubaydah provided identifying KSM as "Mukhtar" and the mastermind of 9/11 was significant to CIA analysts, operators, and FBI interrogators. Both the Congressional Joint Inquiry into the 9/11 Attacks and the 9/11 Commission discussed the importance of this information to the Intelligence Community in understanding KSM's role in the attacks and in the al-Qa'ida organization.

(U) ***The Thwarting of the Dirty Bomb/Tall Buildings Plot and the Capture of Jose Padilla***

~~(TS~~[redacted]~~NF)~~ The Study falsely claims that "[a] review of CIA operational cables and other CIA records found that the use of the CIA's *enhanced interrogation techniques played no role* in the identification of 'Jose Padilla' or the thwarting of the Dirty Bomb or Tall Buildings plotting. CIA records indicate that: . . . (3) Abu Zubaydah provided this information to FBI officers who were using rapport-building techniques, in April 2002, more than three months *prior* to the CIA's 'use of DOJ-approved enhanced interrogation techniques,' . . . ."[30] However, CIA records clearly indicate that during the time period when FBI agents and CIA officers were working together in rotating, round-the-clock shifts, some of the interrogation techniques used on Abu Zubaydah included *nudity*,[31] *liquid diet*,[32] *sensory deprivation*,[33] and

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[26] *See* DCIA Talking Points: Waterboard, 06 November 2007, pp. 1-3. This document was sent to DCIA on November 6 in preparation for a meeting with the President.
[27] SSCI Study, Executive Summary, December 3, 2014, p. 315.
[28] *See* DCIA Talking Points: Waterboard, 06 November 2007, pp. 1-3.
[29] SSCI Study, Executive Summary, December 3, 2014, p. 313.
[30] SSCI Study, Executive Summary, December 3, 2014, pp. 229-31 (emphasis added).
[31] SSCI Transcript, *Staff Interview of FBI Special Agent Ali Soufan*, April 28, 2008, p. 22. (DTS 2008-2411).
[32] *See* CIA, [redacted] 10090, April 21, 2002, p. 5.
[33] *See* CIA, [redacted] 10116, April 25, 2002, pp. 3-4; CIA, [redacted] 10016, April 12, 2002, pp. 4-5.

extended sleep deprivation.[34] Specifically, sleep deprivation played a significant role in Abu Zubaydah's identification of Jose Padilla as an al-Qa'ida operative tasked to carry out an attack against the United States. Abu Zubaydah provided this information to FBI agents during an interrogation session that began late at night on April 20, 2002, and ended on April 21, 2002. Between April 15, 2002 and April 21, 2002, *Abu Zubaydah was deprived of sleep for a total of 126.5 hours (5.27 days) over a 136 hour (5.6 day) period—while only being permitted several brief sleep breaks between April 19, 2002 and April 21, 2002, which totaled 9.5 hours.* Thus, all information provided by Abu Zubaydah subsequent to his return from the hospital on April 15, 2002, was obtained during or after the use of enhanced interrogation techniques and cannot be excluded from supporting the CIA's effectiveness representations under the Study's flawed analytical methodology. Over the course of his detention, Abu Zubaydah provided 766 sole-source disseminated intelligence reports.[35]

(U) *The Capture of Ramzi bin al-Shibh*

~~(TS~~[redacted]~~NF)~~ The Study claims, "[a] review of CIA records found *no connection* between Abu Zubaydah's reporting on Ramzi bin al-Shibh and Ramzi bin al-Shibh's capture. . . . While CIA records indicate that Abu Zubaydah provided information on Ramzi bin al-Shibh, there is *no indication* that Abu Zubaydah provided information on bin al-Shibh's whereabouts. Further, while Abu Zubaydah provided information on bin al-Shibh while being subjected to the CIA's enhanced interrogation techniques, *he provided similar information* to FBI interrogators *prior* to the initiation of the CIA's enhanced interrogation techniques."[36]

~~(TS~~[redacted]~~NF)~~ CIA records demonstrate that Abu Zubaydah was subjected to enhanced interrogation techniques during two separate periods in April 2002 and August 2002. During these timeframes, Abu Zubaydah made several photographic identifications of Ramzi bin al-Shibh and provided information that bin al-Shibh had been in Kandahar at the end of 2001, but was then working with KSM in Karachi, Pakistan. More important, Abu Zubaydah provided information about how he would go about locating Hassan Ghul and other al-Qa'ida associates in Karachi. This information caused [redacted] Pakistani authorities to intensify their efforts and helped lead them to capture Ramzi bin al-Shibh and other al-Qa'ida associates during the Karachi safe house raids conducted on September 10-11, 2002.

(U) *The Capture of Khalid Shaykh Mohammad*

~~(TS~~[redacted]~~NF)~~ The Study claims "there are no CIA records to support the assertion that Abu Zubaydah, Ramzi bin al-Shibh, or any other CIA detainee played any role in the 'the planning and execution of the operation that captured Khalid Sheikh Mohammed.'"[37] However, information obtained from CIA detainee Abu Zubaydah was essential to furthering the CIA's understanding of KSM's role in the September 11, 2001, terrorist attacks and helped lead to the capture of Ramzi bin al-Shibh. The [redacted] interrogations of bin al-Shibh and DETAINEE R provided key insights about KSM [redacted] Information produced through detainee interrogation was pivotal to the retention of a key CIA asset whose cooperation led directly to the capture of KSM.

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[34] *See* CIA, [redacted] 10094, April 21, 2002, p. 3; CIA, [redacted] 10071, April 19, 2002, p. 2; CIA, [redacted] 10091, April 21, 2002, p. 2. Dietary manipulation, nudity, and sleep deprivation (more than 48 hours) were also subsequently authorized as enhanced interrogation techniques by the Department of Justice. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, May 30, 2005, *Re: Application of United States Obligations under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High value Al Qaeda Detainees* (DTS 2009-1810, Tab-11).

[35] SSCI Study, Volume III, March 31, 2014, pp. 282-283.

[36] SSCI Study, Executive Summary, December 3, 2014, p. 318 (emphasis added).

(U) *The Disruption of the Karachi Hotels Bombing Plot*

~~(TS~~[redacted]~~NF)~~ The Study claims, "[T]he CIA's enhanced interrogation techniques—to include the waterboard—played no role in the disruption of the Karachi Plot(s)."[38] However, CIA documents show that key intelligence collected through the CIA's Detention and Interrogation Program, including information obtained after the use of enhanced interrogation techniques, played a major role in disrupting the Karachi hotels bombing plot. Specifically, Abu Zubaydah provided crucial information that helped lead to the successful [redacted] raids of the al-Qa'ida safe houses on September 11, 2002—the same raids that yielded the "perfume letter" and disrupted the Karachi hotels plot. Specifically, the [redacted] raids were the direct result of information provided by Abu Zubaydah on August 20, 2002, during his second period of enhanced interrogation.

(U) *The Heathrow and Canary Wharf Plots*

~~(TS~~[redacted]~~NF)~~ The Study asserts that "contrary to CIA representations, information acquired during or after the use of the CIA's enhanced interrogation techniques played no role in 'alert[ing]' the CIA to the threat to—or the 'disrupt[ing]' the plotting against—Heathrow Airport and Canary Wharf."[39] We found that the CIA interrogation program played a key role in disrupting the Heathrow and Canary Wharf plotting. Specifically, the Study itself twice concedes these plots were "fully disrupted" with the detentions of Ramzi bin al-Shibh, KSM, Ammar al-Baluchi, and Khallad bin Attash.[40] The Study then incorrectly asserts, "There are no CIA records to indicate that any of the detainees were captured as a result of CIA detainee reporting."[41] Information obtained from the CIA interrogation program played a key role in the capture of al-Shibh and KSM.[42] Also, Ramzi bin al-Shibh provided information about Ammar al-Baluchi and Abu Zubaydah provided information about Khallad bin Attash prior to their arrests.[43] The same detainee information that helped lead to the capture of these terrorists also played a key role in fully disrupting the Heathrow Airport and Canary Wharf plots.

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[37] SSCI Study, Executive Summary, December 3, 2014, p. 327.

[38] SSCI Study, Executive Summary, December 3, 2014, p. 242.

[39] SSCI Study, Executive Summary, December 3, 2014, pp. 297-298.

[40] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 295 and 299.

[41] SSCI Study, Executive Summary December 3, 2014, p. 299.

[42] *See* SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, December 5, 2014, pp. 37-41.

[43] *See* SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, December 5, 2014, pp. [redacted] and 47.

(U) *The Capture of Hambali*

~~(TS~~[redacted]~~NF)~~ The Study claims that "[a] review of CIA operational cables and other records found that information obtained from KSM during or after the use of the CIA's enhanced interrogation techniques played no role in the capture of Hambali."[44] However, CIA documents show that the interrogation of KSM and al-Qa'ida operative Zubair, during and after the use of enhanced interrogation techniques on both individuals, played a key role in the capture of Hambali. Specifically, CIA documents indicate it was the combination of reporting from KSM and Majid Khan that led to the efforts to find Hambali through Zubair. A CIA summary of Hambali's capture timeline states, while "numerous sources had placed Hambali in various Southeast Asian countries, it was captured al-Qa'ida leader KSM who put [redacted] on Hambali's trail"—contradicting the Study's claim that the KSM interrogation played "no role."[45]

(U) *The Thwarting of the Second Wave Plots and Discovery of the Al-Ghuraba Group*

~~(TS~~[redacted]~~NF)~~ The Study claims that, "[a] review of CIA operational cables and other documents found that the CIA's enhanced interrogation techniques played no role in the 'discovery' or thwarting of either 'Second Wave' plot. Likewise, records indicate that the CIA's enhanced interrogation techniques played no role in the 'discovery' of a 17-member 'cell tasked with executing the 'Second Wave.''"[46] However, we found that the CIA interrogation program played a key role in disrupting the "Second Wave" plot and led to the capture of the 17-member al-Ghuraba group. Specifically, the Study ignores that KSM, who had also been subjected to the CIA's enhanced interrogation techniques, provided information months earlier on this same group of JI students and their location in Karachi—information that helped lead to the capture of Gunawan himself. According to CIA information, while the CIA was already aware of Gunawan, "KSM's identification of his role as Hambali's potential successor prioritized his capture. Information from multiple detainees, including KSM, narrowed down [Gunawan's] location and enabled his capture in September 2003."[47] This information was excluded from the Study. Pakistani authorities arrested the members of the al-Ghuraba group during raids on [redacted] A cable describing the arrests said [redacted] captured this cell based on the debriefings of captured senior al-Qa'ida operatives, who stated that some members of this cell were to be part of senior al-Qa[']ida leader Khalid Shaykh Muhammad (KSM)['s] [']second wave['] operation to attack the United States using the same modus operandi as was used in the September 11, 2001 attacks."[48]

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[44] SSCI Study, Executive Summary, December 3, 2014, p. 305.
[45] CIA, *Hambali Capture/Detention Timeline*, no date, p. 6.
[46] SSCI Study, Executive Summary, December 3, 2014, p. 251. This claim has been modified from the version that appeared in the report that was approved by the Committee at the end of the 112th Congress. For example, it no longer claims that the CIA's interrogation program, excluding the use of enhanced interrogation techniques, did not play a role in the thwarting of the al-Ghuraba Group. It also substitutes the words "discovery *or* thwarting" in place of the original "identification *and* disruption." (emphasis added).
[47] CIA, Detainee Reporting Pivotal for the War Against Al-Qa'ida, June 1, 2005, p. 2 (DTS 2009-1387).
[48] CIA, CIA CABLE 52981, [redacted]

(U) *Critical Intelligence Alerting the CIA to Jaffar al-Tayyar*

~~(TS~~[redacted]~~NF)~~ The Study asserts that,

> CIA representations [about detainee reporting on Jaffar al-Tayyar] also omitted key contextual facts, including that . . . (2) CIA detainee Abu Zubaydah provided a description and information on a KSM associate named Jaffar al-Tayyar to FBI Special Agents in May 2002, prior to being subjected to the CIA's enhanced interrogation techniques . . . and (5) CIA records indicate that KSM did not know al-Tayyar's true name and that it was Jose Padilla—in military custody and being questioned by the FBI—who provided al-Tayyar's true name as Adnan el-Shukrijumah."[49]

~~(TS~~[redacted]~~NF)~~ On May 20, 2002, while in CIA custody, Abu Zubaydah provided information on an associate of KSM by the name of Abu Jaffar al-Thayer. Abu Zubaydah provided a detailed description of Abu Jaffar al-Thayer, including that he spoke English well and may have studied in the United States.[50] The Study incorrectly claims that this May 20, 2002, interrogation took place prior to the initiation of the CIA's enhanced interrogation techniques.[51] Abu Zubaydah had already been subjected to an extended period of sleep deprivation and other enhanced interrogation techniques during his interrogation between April 15, 2002 and April 21, 2002, about one month *prior* to his May 20 interrogation.[52]

~~(TS~~[redacted]~~NF)~~ The Study also cites as a key contextual fact omitted from CIA representations that KSM did not know al-Tayyar's true name, and it was Jose Padilla, in military custody and being questioned by the FBI, who provided al-Tayyar's true name as Adnan el-Shukrijumah.[53] However, this omission was rendered moot because, as the Study itself notes a few pages later,[54] the "FBI began participating in the military debriefings [of Padilla] in March 2003, *after KSM reported Padilla might know the true name of a US-bound al-Qa'ida operative known at the time only as Jaffar al-Tayyar*. Padilla confirmed Jaffar's true name as Adnan El Shukrijumah."[55]

(U) *The Arrest and Prosecution of Saleh al-Marri*

~~(TS~~[redacted]~~NF)~~ The Study correctly asserts, "The CIA represented to the CIA Office of Inspector General that 'as a result of the lawful use of EITs,' KSM 'provided information that helped lead to the arrests of terrorists including . . . Saleh Almari, a sleeper operative in New York.'"[56] As the Study makes clear, al-Marri was not arrested based on information from KSM, and could not have been, because al-Marri was arrested in December 2001, before the detention of KSM in March 2003.[57]

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[49] SSCI Study, Executive Summary, December 3, 2014, pp. 358-359.

[50] *See* FBI draft report of the interrogation of Abu Zubaydah, May 20, 2002, 5:25 p.m. to 8:40 p.m., p 3.

[51] *See* SSCI Study, Executive Summary, December 3, 2014, p. 362.

[52] *See infra*, SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, December 5, 2014, pp. 33-36.

[53] *See* SSCI Study, Executive Summary, December 3, 2014, p. 359.

[54] *See* SSCI Study, Executive Summary, December 3, 2014, p. 365 (emphasis added).

[55] *See* CIA, *Briefing Notes on the Value of Detainee Reporting*, April 15, 2005, p. 3 (emphasis added); *See also CIA*, ALEC [redacted] March 21, 2003, p. 6 ("Our service has developed new information, based on leads from detained al-Qa'ida operations chief Khalid Shaykh Muhammad (KSM), that al-Qa'ida operative Jafar al-Tayyar's true name is Adnan Shukri Jumah and he could be involved in an imminent suicide attack in the United States").

~~(TS~~[redacted]~~NF)~~ In its response to the Study, the CIA concedes that the agency erred in describing detainee reporting as contributing to al-Marri's arrest. However, the agency stresses that KSM did provide valuable intelligence on al-Marri—intelligence that played a significant role in al-Marri's prosecution.[58] It was KSM who identified a photograph of al-Marri and described him as an al-Qa'ida sleeper operative sent to the United States shortly before 9/11. KSM said he planned for al-Marri, who "had the perfect built-in cover for travel to the United States as a student pursuing his advanced degree in computer studies at a university near New York," to serve as al-Qa'ida's point of contact to settle other operatives in the United States for follow-on attacks after 9/11.[59] KSM also said that al-Marri trained at the al-Faruq camp, had poisons training, and had offered himself as a martyr to bin Ladin.[60]

~~(TS~~[redacted]~~NF)~~ Prior to the information from KSM, al-Marri was charged with credit card fraud and false statements. After the information from KSM, al-Marri was designated as an enemy combatant. In 2009, after being transferred to federal court, al-Marri pled guilty to one count of conspiracy to provide material support to al-Qa'ida. In his plea, he admitted that he attended terrorist training camps and met with KSM to offer his services al-Qa'ida, who told him to travel to the United States before 9/11 and await instructions—*all information initially provided by KSM.*

(U) *The Arrest and Prosecution of Iyman Faris*

(U) The Study claims, "[o]ver a period of years, the CIA provided the 'identification,' 'arrest,' 'capture,' 'investigation,' and 'prosecution' of Iyman Faris as evidence for the effectiveness of the CIA's enhanced interrogation techniques. These representations were inaccurate."[61] The Study correctly points out that CIA statements implying that detainee information led to the "identification" or "investigation" of Iyman Faris were inaccurate. However, CIA, FBI, and Department of Justice documents show that information obtained from KSM after he was waterboarded led directly to Faris's arrest and was key in his prosecution.

~~(TS~~[redacted]~~NF)~~ On March 17 and 18, 2003, the CIA questioned KSM about Majid Khan's family and KSM stated that another Khan relative, whom he identified from a picture of Faris, was a "truck driver in Ohio."[62] On March 18, 2003, KSM told interrogators he tasked the truck driver to procure specialized machine tools that would be useful to al-Qaida in loosening the nuts and bolts of suspension bridges in the United States. KSM said he was informed by an intermediary that Faris could not find the tools.[63] This revelation would turn out to be a key piece of incriminating evidence against Iyman Faris. The Study excluded information found in CIA documents which shows that, immediately after obtaining information from KSM and Majid Khan regarding Faris, the CIA queried the FBI for "additional details" on Faris, "including a readout on his current activities and plans for FBI continued investigation."[64] The cable specifically noted that "KSM seems to have accurately identified" Faris from a photograph as the "truck driver in Ohio."[65]

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[56] SSCI Study, Executive Summary, December 3, 2014, p. 366.
[57] SSCI Study, Executive Summary, December 3, 2014, p. 366.
[58] See CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 35.
[59] CIA, WASHINGTON DC [redacted]
[60] *See* CIA, CIA WASHINGTON DC [redacted]
[61] SSCI Study, Executive Summary, December 3, 2014, p. 276-277.
[62] CIA, CIA CABLE 10886, March 18, 2003, pp 5-6.

~~(TS~~[redacted]~~NF)~~ On March 20, 2003, the FBI picked up Faris for questioning and conducted a consent search of his apartment, seizing his laptop. When our staff asked the FBI why Faris was picked up, they cited the cables from CIA.[66] The FBI investigators went into this interview armed with the information revealed by KSM and Majid Khan, which enabled them to explore Faris's ties with KSM and al-Qa'ida plotting in the United States.[67] On May 1, 2003, Faris pled guilty to "casing a New York City bridge for al Qaeda, and researching and providing information to al Qaeda regarding the tools necessary for possible attacks on U.S. targets," *the exact terrorist activities described by KSM*. Ultimately, the CIA's representation concerning the identification and initial investigation of Faris is much less important than the details that led to his arrest and prosecution.

(U) *The Arrest and Prosecution of Uzhair Paracha and the Arrest of Saifullah Paracha*

~~(TS~~[redacted]~~NF)~~ The Study asserts, "[t]he CIA represented that information obtained through the use of the CIA's enhanced interrogation techniques produced otherwise unavailable intelligence that led to the identification and/or arrest of Uzhair Paracha and his father Saifullah Paracha (aka, Sayf al-Rahman Paracha). These CIA representations included inaccurate information and omitted significant material information, specifically a body [of] intelligence reporting—acquired prior to CIA detainee reporting—that linked the Parachas to al-Qa'ida-related terrorist activities."[68]

~~(TS~~[redacted]~~NF)~~ We found, however, that information obtained from KSM during his enhanced interrogation on March 25, 2003, about alleged explosives smuggling into the United States, attacks on U.S. gas stations, and related material support to al-Qa'ida, motivated the FBI to track down and arrest Uzhair Paracha in New York a few days later on March 31, 2003.[69] The Intelligence Community continued its pursuit of Saifullah, who was later arrested [redacted] on July 6, 2003. Among other charges, Uzhair was successfully convicted on November 23, 2005, of providing material support to al-Qa'ida and sentenced to 30 years in prison. KSM's description of Uzhair's involvement in the gas station plots and his claim that Uzhair may have provided other logistical support for Majid's entry into the United States was consistent with the press release's description of some of the evidence used during Uzhair's trial.[70]

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[63] CIA, CIA CABLE 10886, March 18, 2003, pp 5-6.
[64] CIA, [redacted] *Information from KSM on Majid Khan.*
[65] CIA, [redacted] *Information from KSM on Majid Khan.*
[66] Phone call from the FBI responding to minority staff questions from a document review, January 25, 2013.
[67] *See* CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 13; FBI WASH 040537Z, April 4, 2003, p. 2.
[68] SSCI Study, Executive Summary, December 3, 2014, p. 352.
[69] CIA, DIRECTOR [redacted]

(U) *Tactical Intelligence on Shkai, Pakistan*

(U) This case study is no longer as problematic as the version contained in the appendix to the original Findings and Conclusions section of the Study approved by the Committee during the 112th Congress. That appendix falsely accused the CIA of providing an inaccurate representation about the tactical intelligence acquired on Shkai, Pakistan, during the interrogations of Hassan Ghul after the use of enhanced interrogation techniques.[71] Fortunately, that appendix has been dropped from the Study's updated Findings and Conclusions and there is no claim in the updated version of the Study that the representation concerning Shkai, Pakistan, was inaccurate.

(U) *Thwarting of the Camp Lemonier Plotting*

~~(TS~~[redacted]~~NF)~~ The Study claims, "[t]he CIA represented that intelligence derived from the use of CIA's enhanced interrogation techniques thwarted plotting against the U.S. military base, Camp Lemonier, in Djibouti. These representations were inaccurate."[72] We found, however that representations about the thwarting of an attack against Camp Lemonier in Djibouti, specifically President Bush's 2006 comments that "Terrorists held in CIA custody have also provided information that helped stop a planned strike on U.S. Marines at Camp Lemonier in Djibouti," were accurate and have been mischaracterized by the Study.[73] Specifically, contrary to the Study's assertions, the President did not attribute the thwarting of this plot exclusively to the use of enhanced interrogation techniques, but information from "[t]errorists held in CIA custody." In addition, the President never stated that the plot was disrupted exclusively because of information from detainees in CIA custody. The President was clear that information from detainees "helped" to stop the planned strike. This idea that detainee reporting builds on and contextualizes previous and subsequent reporting is repeated a few lines later in the speech, when the President makes clear, "[t]he information we get from these detainees is corroborated by intelligence . . . that we've received from other sources, and together this intelligence has helped us connect the dots and stop attacks before they occur."[74]

(U) *CIA Detainees Subjected to EITs Validated CIA Sources*

~~(TS~~[redacted]~~NF)~~ The Study claims, "the CIA also represented that its enhanced interrogation techniques were necessary to validate CIA sources. The claim was based on one CIA detainee—Janat Gul—contradicting the reporting of one CIA asset."[75] Contrary to the Study's claim, the representations cited by the Study do not assert that enhanced interrogation techniques helped to validate sources. Rather, the representations only make reference to "detainee information" or detainee "reporting." Also contrary to the Study's claim, we found evidence in the documentary record where the CIA representations about Janat Gul also contained additional examples of source validation. Moreover, the three items of information that the Study asserts should have been included in the Janat Gul asset validation representations were not "critical" and their inclusion does not alter the fact that Gul's persistent contradiction of the asset's claims did help the CIA "validate" that particular asset.

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[70] *See* DOJ, United States Attorney, Southern District of New York, *Pakistani Man Convicted of Providing Material Support to Al Qaeda Sentenced to 30 Years in Federal Prison,* July 20, 2006, p.2.

[71] SSCI Study, December 13, 2012, Findings and Conclusions, *Appendix: Details on CIA's Effectiveness Representations–Conclusion #9*, p. 92.

[72] SSCI Study, Executive Summary, December 3, 2014, p. 336.

[73] President George W. Bush, *Trying Detainees; Address on the Creation of Military Commissions*, Washington, D.C., September 6, 2006.

[74] President George W. Bush, *Trying Detainees; Address on the Creation of Military Commissions,* Washington, D.C., September 6, 2006.

(U) *The Identification of Bin Ladin's Courier*

~~(TS~~[redacted]~~NF)~~ The Study asserts, "the 'tipoff' on Abu Ahmad al-Kuwaiti in 2002 did not come from the interrogation of CIA detainees and was obtained prior to any CIA detainee reporting."[76] However, CIA documents show that detainee information served as the "tip-off" and played a significant role in leading CIA analysts to the courier Abu Ahmad al-Kuwaiti. While there was other information in CIA databases about al-Kuwaiti, this information was not recognized as important by analysts until after detainees provided information on him. Specifically, a CIA paper in November 2007 noted that "over twenty mid to high-value detainees have discussed Abu Ahmad's ties to senior al-Qa'ida leaders, including his role in delivering messages from Bin Ladin and his close association with former al-Qa'ida third-in-command Abu Faraj al-Libi."[77] The report highlighted specific reporting from two detainees, Hassan Ghul and Ammar al-Baluchi, who both identified Abu Faraj al-Libi's role in communicating to bin Ladin through Abu Ahmad. It was this and similar reporting from other detainees that helped analysts realize Abu Faraj's categorical denials that he even knew anyone named Abu Ahmad al-Kuwaiti, "almost certainly were an attempt to protect Abu Ahmed," thus showing his importance.[78]

~~(TS~~[redacted]~~NF)~~ The Study also asserts, "the most accurate information on Abu Ahmad al-Kuwaiti obtained from a CIA detainee [Hassan Ghul] was provided by a CIA detainee who had not yet been subjected to the CIA's enhanced interrogation techniques."[79] We found, however, that Detainees who provided useful and accurate information on Abu Ahmad al-Kuwaiti and bin Ladin had undergone enhanced interrogation prior to providing the information. Specifically, Ammar al-Baluchi, who appears to be the first detainee to mention Abu Ahmad al-Kuwaiti's role as a bin Ladin courier and a possible connection with Abu Faraj al-Libi, provided this information at a CIA black site during a period of enhanced interrogation.[80]

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[75] SSCI Study, Executive Summary, December 3, 2014, p. 342.
[76] SSCI Study, Executive Summary, December 3, 2014, p. 389.
[77] CIA Intelligence Assessment, *Al-Qa'ida Watch, Probable Identification of Suspected Bin Ladin Facilitator Abu Ahmad al-Kuwaiti*, November 23, 2007, p. 2.
[78] CIA Intelligence Assessment, *Al-Qa'ida Watch, Probable Identification of Suspected Bin Ladin Facilitator Abu Ahmad al-Kuwaiti*, November 23, 2007, p. 2.
[79] SSCI Study, Executive Summary, December 3, 2014, p. 379.
[80] *See* CIA, WASHINGTON DC [redacted] Ammar al-Baluchi attempted to recant his earlier description of Abu Ahmad as a Bin Ladin courier. CIA, DIRECTOR [redacted]

~~(TS~~[redacted]~~NF)~~ Additional CIA-fact checking explained that Ghul offered more details about Abu Ahmad's role after being transferred from COBALT and receiving enhanced interrogation. Specifically, the CIA stated:

> After undergoing enhanced techniques, Gul stated that Abu Ahmad specifically passed a letter from Bin Ladin to Abu Faraj in late 2003 and that Abu Ahmad had "disappeared" from Karachi, Pakistan in 2002. This information was not only more concrete and less speculative, it also corroborated information from Ammar that Khalid Shaykh Muhammad (KSM) was lying when he claimed Abu Ahmad left al-Qa'ida in 2002.[81]

Ghul stated that while he had "no proof," he believed that Abu Faraj was in contact with Abu Ahmad and that Abu Ahmad might act as an intermediary contact between Abu Faraj and Bin Ladin. Ghul said that this belief "made sense" since Abu Ahmad had disappeared and Ghul had heard that Abu Ahmad was in contact with Abu Faraj.[82] Months later, Ghul also told his interrogators that he knew Abu Ahmad was close to Bin Ladin, which was another reason he suggested that Abu Ahmad had direct contact with Bin Ladin as one of his couriers.[83]

~~(TS~~[redacted]~~NF)~~ The role of other detainees who had undergone enhanced interrogation, but were believed to be untruthful about knowing Abu Ahmad al-Kuwaiti, was described by CIA analysts as being very significant in their understanding of the courier as well. CIA documents make clear that when detainees like Abu Zubaydah, KSM, and Abu Faraj al-Libi—who had undergone enhanced interrogation and were otherwise cooperative—denied knowing Abu Ahmad Kuwaiti or suggested that he had "retired," it was a clear sign to CIA analysts that these detainees had something to hide, and it further confirmed other detainee information that had tipped them off about the true importance of Abu Ahmad al-Kuwaiti.[84]

(U) Conclusion 6 (CIA Impeded Congressional Oversight)

~~(TS~~[redacted]~~NF)~~ Conclusion 6 states: "[t]he CIA has actively avoided or impeded congressional oversight of the program."[85] In reality, the overall pattern of engagement with the Congress shows that the CIA attempted to keep the Congress informed of its activities. From 2002 to 2008, the CIA provided more than 35 briefings to SSCI members and staff, more than 30 similar briefings to HPSCI members and staff, and more than 20 congressional notifications.[86] Because the Study did not interview the participants in these restricted briefings, it is impossible to document how much information the CIA provided to Committee leadership during those briefings. Often, the Study's own examples contradict the assertion that the CIA tried to avoid its overseers' scrutiny. For example, the Study notes that the CIA reacted to Vice

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[81] CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 38 (citing CIA, [redacted]

[82] CIA, [redacted]

[83] CIA, DIRECTOR [redacted]

[84] CIA, DIRECTOR [redacted] CIA Center for the Study of Intelligence, *Lessons from the Hunt for Usama Bin Ladin*, dated September 2012, pp. 9-10 (DTS 2012-3826); CIA Intelligence Assessment, *Al-Qa'ida Watch, Probable Identification of Suspected Bin Ladin Facilitator Abu Ahmad al-Kuwaiti*, November 23, 2007, p. 2.

[85] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5.

[86] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 35.

Chairman Rockefeller's suspicion about the agency's honesty by planning a detailed briefing on the Program for him.[87]

~~(TS~~[redacted]~~NF)~~ The Study claims, "[t]he CIA did not brief the Senate Intelligence Committee leadership on the CIA's enhanced interrogation techniques until September 2002, after the techniques had been approved and used."[88] We found that the CIA provided information to the Committee in hearings, briefings, and notifications beginning shortly after the signing of the Memorandum of Notification (MON) on September 17, 2001. The Study's own review of the CIA's representations to Congress cites CIA hearing testimony from November 7, 2001, discussing the uncertainty in the boundaries on interrogation techniques.[89] The Study also cites additional discussions between staff and CIA lawyers in February 2002.[90] The Study seems to fault the CIA for not briefing the Committee leadership until after the enhanced interrogation techniques had been approved and used. However, the use of DOJ-approved enhanced interrogation techniques began during the congressional recess period in August, an important fact that the Study conveniently omitted.[91] The CIA briefed HPSCI leadership on September 4, 2002. SSCI leadership received the same briefing on September 27, 2002.[92]

~~(TS~~[redacted]~~NF)~~ The Study also asserts, "[t]he CIA subsequently resisted efforts by then-Vice Chairman John D. Rockefeller, IV, to investigate the program, including by refusing in 2006 to provide requested documents."[93] However, we determined that the CIA provided access to the documents requested. On January 5, 2006, the Director of National Intelligence's Chief of Staff wrote a letter to Vice Chairman Rockefeller which denied an earlier request for full Committee access to over 100 documents related to the Inspector General's May 2004 Special Review.[94] However, this denial of "full Committee access," did not mean that the documents were not made available to the CIA's congressional overseers. In fact, the Chief of Staff's letter stated, "Consistent with the provisions of the National Security Act of 1947, the White House has directed that specific information related to aspects of the detention and interrogation program be provided only to the SSCI leadership and staff directors."[95] The letter concluded by advising Vice Chairman Rockefeller that the documents "remain available for review by SSCI leadership and staff directors at any time through arrangements with CIA's Office of Congressional Affairs."[96]

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[87] *See* SSCI Study, Executive Summary, December 3, 2014, p. 441.

[88] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5.

[89] SSCI Study, Executive Summary, December 3, 2014, p. 437 n.2447. *See also* SSCI Transcript, *Briefing on Covert Action*, November 7, 2001, p. 56 (DTS 2002-0611).

[90] *See* SSCI Study, Executive Summary, December 3, 2014, p. 437; Email from: Christopher Ford, SSCI Staff, to: [redacted] Cleared SSCI staff; subject: Meeting yesterday with CIA lawyers on [redacted] date: February 26, 2002 (DTS 2002-0925).

[91] *See* CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 36.

[92] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 36.

[93] SSCI Study, Findings and Conclusions, December 3, 2014, pp. 5-6.

[94] SSCI Study, Executive Summary, December 3, 2014, p. 442.

[95] Letter from David Shedd to Andy Johnson, January 5, 2006 (DTS 2006-0373).

[96] Letter from David Shedd to Andy Johnson, January 5, 2006 (DTS 2006-0373).

~~(TS~~[redacted]~~NF)~~ In support of this erroneous conclusion that the CIA impeded congressional oversight, the Study notes that the "CIA restricted access to information about the program from members of the Committee beyond the Chairman and Vice Chairman until September 6, 2006."[97] Although we agree that the full Committee should have been briefed much earlier, the CIA's limitation of access to sensitive covert action information is a long-standing practice codified in Section 503 of the National Security Act of 1947, as amended.

~~(TS~~[redacted]~~NF)~~ The Study notes that the CIA briefed a number of additional Senators who were not on the Select Committee on Intelligence.[98] The National Security Act permits the President to provide senators with information about covert action programs at his discretion, without regard to Committee membership. Moreover, providing a briefing to inform key senators working on legislation relevant to the CIA's program is inconsistent with the narrative that the CIA sought to avoid congressional scrutiny.

(U) Conclusion 7 (CIA Impeded White House Oversight)

(U) Conclusion 7 states, "[t]he CIA impeded effective White House oversight and decision-making."[99] It is important to place this serious allegation within its proper context—the CIA's Detention and Interrogation Program was conducted as a covert action.[100] Covert action is the sole responsibility of the White House, a principle enshrined in law since the National Security Act of 1947.[101] The President, working with his National Security Staff, approves and oversees all covert action programs. The congressional intelligence committees also conduct ongoing oversight of all covert actions and receive quarterly covert action briefings. Given this extensive covert action oversight regime, this conclusion seems to imply falsely that the CIA was operating a rogue intelligence operation designed to "impede" the White House. We reject this unfounded implication.

~~(TS~~[redacted]~~NF)~~ The Study asserts, "[a]ccording to CIA records, no CIA officer, up to and including CIA Directors George Tenet and Porter Goss, briefed the President on the specific CIA enhanced interrogation techniques before April 2006. By that time, 38 of the 39 detainees identified as having been subjected to the CIA's enhanced interrogation techniques had already been subjected to the techniques."[102] We found that the CIA records are contradictory and incomplete regarding when the President was briefed, but President Bush himself says he was briefed in 2002, before any techniques were used.[103]

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[97] SSCI Study, Findings and Conclusions, December 3, 2014, p. 6.
[98] *See* SSCI Study, Executive Summary, December 3, 2014, p. 443.
[99] SSCI Study, Findings and Conclusions, December 3, 2014, p. 6.
[100] *See* SSCI Study, Executive Summary, December 3, 2014, p. 11. "On September 17, 2001, six days after the terrorist attacks of September 11, 2001, President George W. Bush signed a covert action MON to authorize the Director of Central Intelligence (DCI) to '*undertake operations designed to capture and detain* persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities.'" (emphasis added).
[101] In 1974, the Hughes-Ryan amendment to the Foreign Assistance Act of 1961 created the requirement for presidential "Findings" for covert action. The Intelligence Oversight Acts of 1980 and 1988 amended the Finding process, and the Intelligence Oversight Act of 1991 replaced Hughes-Ryan with the current Finding process. *See* William Daugherty, *Executive Secrets, Covert Action and the Presidency*, The University Press of Kentucky, 2004, pp. 92-98.
[102] SSCI Study, Findings and Conclusions, December 3, 2014, p. 6.

~~(TS~~[redacted]~~NF)~~ The Study claims that, "[t]he information provided connecting the CIA's detention and interrogation program directly to [the "Dirty Bomb" Plot/Tall Buildings Plot, the Karachi Plots, Heathrow and Canary Wharf Plot, and the Identification/Capture of Iyman Faris] was, to a great extent, inaccurate."[104] We found, however, the information provided to the White House attributing the arrests of these terrorists and the thwarting of these plots to the CIA's Detention and Interrogation Program was accurate.[105]

(U) Conclusion 8 (CIA Impeded National Security Missions of Executive Branch Agencies)

(U) Conclusion 8 states, "[t]he CIA's operation and management of the program complicated, and in some cases impeded, the national security missions of other Executive Branch agencies."[106] As noted in the CIA response to the Study, "the National Security Council established the parameters for when and how CIA could engage on the program with other Executive Branch agencies."[107] The CIA was not responsible nor did it have control over the sharing or dissemination of information to other executive branch agencies or members of the Principals Committee itself. That responsibly rested solely with the White House.

~~(TS~~[redacted]~~NF)~~ The Study claims, "[t]he CIA blocked State Department leadership from access to information crucial to foreign policy decision-making and diplomatic activities."[108] However, the Study does not provide any evidence that the CIA deliberately impeded, obstructed or blocked the State Department from obtaining information about the Program inconsistent with directions from the White House or the National Security Council. CIA officers were in close and constant contact with their State Department counterparts where detention facilities were located and among senior leadership to include the Secretary of State and the U.S. Deputy Secretary of State. For example, leading to the establishment of a facility in Country[redacted] the Study notes that the chief of station (COS) was coordinating activities with the ambassador. Because the Program was highly compartmented, the ambassador was directed by the National Security Council not to discuss with his immediate superior at headquarters due to the highly compartmented nature of the covert action. Instead, the COS, sent feedback from the ambassador through CIA channels, to the NSC, whereby the Deputy Secretary of State with the knowledge of the Secretary, would discuss any issues or concerns with the ambassador in country.[109] While the process was less direct, the security precautions to protect sensitive information did not impede the national security mission of the State Department.

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[103] *See* George W. Bush, *Decision Points,* Broadway Paperbacks, New York, 2010, p. 169.
[104] SSCI Study, April 1, 2014, Volume II, p. 446.
[105] *See* SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, June 20, 2014, *The Thwarting of the Dirty Bomb/Tall Buildings Plot and the Capture of Jose Padilla,* pp. 33-36; *The Thwarting of the Karachi Plots,* pp. 44-47; *The Heathrow and Canary Wharf Plots,* pp. 47-49; and *The Arrest and Prosecution of Iyman Faris,* pp. 58-60.
[106] SSCI Study, Findings and Conclusions, December 3, 2014, p. 7.
[107] CIA Study Response, *Conclusions (TAB B),* June 27, 2013, p. 11.
[108] SSCI Study, Findings and Conclusions, December 3, 2014, p. 7.
[109] CIA CABLE [redacted] CIA CABLE [redacted] CIA CABLE [redacted]

~~(TS~~[redacted]~~NF)~~ The Study also claims, "[t]he CIA denied specific requests from FBI Director Robert Mueller, III, for FBI access to CIA detainees that the FBI believed was necessary to understand CIA detainee reporting on threats to the U.S. Homeland."[110] While the FBI's participation in the interrogation of detainees was self-proscribed, the Bureau was still able to submit requirements to the CIA and received reports on interrogations. Recognizing the need for FBI access to detainees, both agencies finalized a memorandum of understanding in the fall of 2003 that detailed how FBI [redacted] agents would be provided access to detainees [redacted]."[111]

~~(TS~~[redacted]~~NF)~~ The Study asserts, "[t]he ODNI was provided with inaccurate and incomplete information about the program, preventing the ODNI from effectively carrying out its statutory responsibility to serve as the principal advisor to the President on intelligence matters."[112] We do not agree with this assertion. The updated Study treats this assertion differently than it did in the version that was adopted by the Committee during the 112th Congress. In the original Study, the assertion sought to dispute claims regarding the use of enhanced interrogation techniques and disruption of several plots. However, the updated Study drops the direct reference to coercive measures and instead focuses on the Detention and Interrogation Program in general.[113] The 2006 press release from the Office of Director of National Intelligence[114] does not reference the use of enhanced interrogation techniques, but states unequivocally: "The detention of terrorists disrupts—at least temporarily—the plots they were involved in." To assert that the detention and interrogation of terrorists did not yield intelligence of value is simply not credible.

(U) Conclusion 5 (CIA Provided Inaccurate Information to the Department of Justice)

(U) Conclusion 5 states, "[t]he CIA repeatedly provided inaccurate information to the Department of Justice, impeding a proper legal analysis of the CIA's detention and Interrogation Program."[115] Our analysis of the claims used in support of this conclusion revealed that many were themselves inaccurate or otherwise without merit.

~~(TS~~[redacted]~~NF)~~ The Study falsely claims that "CIA attorneys stated that 'a novel application of using the necessity defense' could be used 'to avoid prosecution of U.S. officials who tortured to obtain information that saved many lives.'"[116] We found that the draft CIA Office of General Counsel (OGC) legal appendix cited by the report contained a cursory discussion of the necessity defense that *did not* support the use of such defense in the context of the CIA's Detention and Interrogation Program.[117] Specifically, the claim here altered the meaning of the quoted text in draft legal appendix by separating portions of the text and inserting its own factually misleading text, which was not supported by the legal analysis, to achieve the following result: "*CIA attorneys stated that* a novel application of the necessity defense *could be used* to avoid prosecution of U.S. officials who tortured to obtain information that saved lives."[118] Fortunately, this erroneously doctored quotation only appears once in the Study—in this Conclusion.

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[110] SSCI Study, Findings and Conclusions, December 3, 2014, p. 7.
[111] SSCI Study, Volume I, March 31, 2014, p. 413.
[112] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[113] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[114] ODNI Press Release, September 6, 2006, "Information on the High Value Terrorist Detainee Program."
[115] SSCI Study, Findings and Conclusions, December 3, 2014, p. 4.
[116] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5.
[117] *See* CIA Office of General Counsel draft *Legal Appendix: Paragraph 5--Hostile Interrogations: Legal Considerations for CIA Officers*, November 26, 2001, pp. 5-6 (CIA, Draft Appendix on Necessity Defense). This

~~(TS~~[redacted]~~NF)~~ Also in support of this conclusion, the Study makes a number of claims related to the accuracy of the information provided by the CIA about Abu Zubaydah to OLC. First, the Study asserts that the OLC "relied on inaccurate CIA representations about Abu Zubaydah's status in al-Qa'ida and the interrogation team's 'certain[ty]' that Abu Zubaydah was withholding information about planned terrorist attacks."[119] We found that the information relied upon by the Study to criticize the CIA's representations about Abu Zubaydah withholding information about planned terrorists attacks neglected to include important statements from within that same intelligence cable, which supported those representations by the CIA. Specifically, the Study cites an email from the CIA's interrogation team that included the sentence: "[o]ur assumption is the objective of this operation [the interrogation of Abu Zubaydah] is to achieve a high degree of confidence that [Abu Zubaydah] is not holding back actionable information concerning threats to the United States beyond that which [Abu Zubaydah] has already provided."[120] However, this carefully chosen text omits critical statements from later in the same cable: "[t]here is information and analysis to indicate that subject has information on terrorist threats to the United States" and "[h]e is an incredibly strong willed individual which is why he has resisted this long."[121]

~~(TS~~[redacted]~~NF)~~ Second, the Study asserts the CIA assessment that Abu Zubaydah was the "third or fourth man" in al-Qa'ida was "based on single-source reporting that was recanted prior to the August 1, 2002, OLC memorandum."[122] The CIA was in possession of multiple threads of intelligence supporting Abu Zubaydah's prominent role in al-Qa'ida.[123] [redacted] However, the level of detail that [redacted] had previously provided about Abu Zubaydah undermined his later attempts to retract his earlier admissions about his involvement in future terrorist attacks [redacted]

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document is attached as Appendix IV to the SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, June 20, 2014, p. IV-1.

[118] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5 (Erroneous text indicated by italics).

[119] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5.

[120] CIA, [REDACTED] 73208, July 23, 2003, p. 3; Email from: CIA staff officer; to: [REDACTED], [REDACTED], [redacted]; subject: Addendum from GREEN, [REDACTED] 73208 (231043Z JUL 02); date: July 23, 2004, at 07:56:49 PM. *See also* email from: [REDACTED]; to: [REDACTED]; subject: Re: Grayson SWIGERT and Hammond DUNBAR date: August 8, 21, 2002, at 10:21 PM.

[121] CIA, [REDACTED] 73208, July 23, 2003, p. 3; email from: CIA staff officer; to: [REDACTED], [REDACTED]. [redacted] subject: Addendum from GREEN, [REDACTED] 73208 (231043Z JUL 02); date: July 23, 2004, at 07:56 PM. *See also* Email from: [REDACTED]; to: [REDACTED]; subject: Re: Grayson SWIGERT and Hammond DUNBAR; date: August 8, 21, 2002, at 10:21 PM.

[122] SSCI Study, Executive Summary, December 3, 2014, p. 410 (emphasis added).

[123] *See* CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 32.

[redacted] and his denials about meeting with Abu Zubaydah.[124] Moreover, Abu Zubaydah himself admitted to at least one meeting with [redacted], which undermines [redacted] denials about such meetings.[125]

~~(TS~~[redacted]~~NF)~~ Third, the Study incredibly claims that ***"[t]he CIA later concluded that Abu Zubaydah was not a member of al-Qa'ida."***[126] We found that the one document cited by the Study did not support this unbelievable and factually incorrect assertion. Specifically, a text box in this cited intelligence product makes the following assertions:

> A common misperception in outside articles is that Khaldan camp was run by al-Qa'ida. Pre-911 September 2001 reporting miscast Abu Zubaydah as a "senior al-Qa'ida lieutenant," which led to the inference that the Khaldan camp he was administering was tied to Usama Bin Ladin . . . .
>
> Al-Qa'ida rejected Abu Zubaydah's request ***in 1993*** to join the group and that Khaldan was not overseen by Bin Ladin's organization.[127]

The Study fails to state that the interrogation of this supposed "non-member" resulted in 766 sole-source disseminated intelligence reports by the Study's own count.[128] Ironically, this intelligence product was written based on "information from detainees and captured documents"—including from Abu Zubaydah.[129]

~~(TS~~[redacted]~~NF)~~ In further support of this conclusion, the Study correctly asserts that "the CIA applied its enhanced interrogation techniques to numerous other CIA detainees without seeking additional formal legal advice from the OLC."[130] However, the CIA appropriately applied the legal principles of the August 1, 2002, OLC memorandum to other CIA detainees. Specifically, the fact that the CIA felt comfortable enough with OLC's August 1, 2002, legal opinion to apply the same legal principles to other detainees does not constitute an impediment to DOJ's legal analysis of the Program. In fact, the Attorney General later expressed the view that "the legal principles reflected in DOJ's specific original advice could appropriately be extended to allow use of the same approved techniques (under the same conditions and subject to the same safeguards) to other individuals besides the subject of DOJ's specific original advice."[131]

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[124] *See* SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, June 20, 2014, p. 91.

[125] CIA, ALEC [redacted] CIA, ALEC [redacted] Abu Zubaydah and [redacted] accounts differ as to the location of this meeting(s).

[126] SSCI Study, Executive Summary, December 3, 2014, p. 410 (emphasis added).

[127] CIA, *Countering Misconceptions About Training Camps in Afghanistan, 1990-2001*, August 16, 2006, p. 2 (emphasis added).). This document is attached as Appendix I to the SSCI Minority Views of Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Rubio, and Coburn, June 20, 2014, p. I-1.

[128] *See* SSCI Study, Volume III, March 31, 2014, pp. 282-283.

[129] CIA, *Countering Misconceptions About Training Camps in Afghanistan, 1990-2001*, August 16, 2006, p. i (DTS 2006-3254).

[130] SSCI Study, Executive Summary, December 3, 2014, p. 411.

[131] *See* Memorandum from Jack Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to John Helgerson, Inspector General, Central Intelligence Agency, June 18, 2004, Addendum, p. 2 (DTS 2004-2730).

~~(TS~~[redacted]~~NF)~~ The Study asserts that the CIA made inaccurate representations to DOJ that Janat Gul and Ahmed Khalfan Ghailani were high-value al Qaeda operatives with knowledge of a pre-election plot against the United States when seeking legal guidance on whether the use of four additional interrogation techniques might violate U.S. law or treaty obligations.[132] Contrary to the Study's claim, the CIA believed the representations to be true at the time it made them to the OLC. The CIA did not learn that some of these representations had been fabricated by a sensitive CIA source until months *after* OLC had approved the use of enhanced interrogation techniques against Janat Gul and Ahmed Khalfan Ghailani. Also, the Study claims that "the threat of a terrorist attack to precede the November 2004 U.S. election was found to be based on a CIA source whose information was questioned by senior CTC officials at the time. The same CIA source admitted to fabricating the information after [redacted] in [redacted] October 2004."[133] However, the email relied upon by the Study does not support the proposition that senior CTC officials questioned the veracity of the sensitive CIA source. While the source did admit to fabricating information about a meeting that never occurred, the Study does not acknowledge that the Chief of Base believed that the source was "generally truthful" about his discussions on the pre-election threat, despite the source's [redacted] on that issue.

~~(TS~~[redacted]~~NF)~~ The Study also repeats its other claims that the CIA's "representations of 'effectiveness' were almost entirely inaccurate and mirrored other inaccurate information provided to the White House, Congress, and the CIA inspector general."[134] Based upon our examination of the "effectiveness" case studies, we assess that the CIA's Detention and Interrogation Program, to include the use of enhanced interrogation techniques, was effective and yielded valuable intelligence. The Study's exaggerated and absolute claims about inaccurate "effectiveness" representations by the CIA have been largely discredited by these minority views and the CIA's June 27, 2013, response to the Study. For the most part, we found that the CIA acknowledged those representations that were made in error or could have benefited from the inclusion of additional clarification.

(U) Conclusion 9 (CIA Impeded Oversight by CIA Office of Inspector General)

(U) Conclusion 9 states, "[t]he CIA impeded oversight by the CIA's Office of Inspector General."[135] However, we found that the Study itself is replete with examples that lead to the opposite conclusion—that the CIA did not significantly impede oversight by the CIA Office of the Inspector General (OIG). The law requires the CIA Inspector General to certify that "the Inspector General has had full and direct access to all information relevant to the performance of his function."[136] Yet, during the timeframe of the Program, the Inspector General certified in every one of its semiannual reports that it had "full and direct access to all CIA information relevant to the performance of its oversight duties."[137] The law also requires the Inspector General to *immediately* report to the congressional intelligence committees if the Inspector General is "unable to obtain significant documentary information in the course of an investigation, inspection or audit . . . ."[138] Again, we are not aware of any such report being made to the SSCI during the relevant time period. We do know, however, that John Helgerson, the CIA Inspector General, testified before SSCI prior to the commencement of the SSCI's review of the CIA Detention and Interrogation Program in February 2007 and did not complain of access to Agency information.[139] Instead, he said that, during 2006, the IG took a comprehensive look at the operations of the CIA's Counterterrorism Center and conducted a separate comprehensive audit of detention facilities. General Helgerson also testified,

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[132] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 416-418.
[133] SSCI Study, Executive Summary, December 3, 2014, p. 417.
[134] SSCI Study, Executive Summary, December 3, 2014, p. 426.
[135] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[136] 50 U.S.C. 3517(d)(1)(D).

> [W]e look carefully at ***all*** cases of alleged abuse of detainees. The first paper of this kind that came to the Committee was in October 2003, not long after these programs had begun, when we looked at allegations of unauthorized interrogation techniques used at one of our facilities. It proved that indeed unauthorized techniques had been used. I'm happy to say that the processes worked properly. An Accountability Board was held. The individuals were in fact disciplined. The system worked as it should.
>
> On this subject, Mr. Chairman, I cannot but underscore that we also look at a fair number of cases where, at the end of the day, we find that we cannot find that there was substance to the allegation that came to our attention. We, of course, make careful record of these investigations because we think it important that you and others know that we investigate all allegations, some of which are borne out, some of which are not.[140]

(U) Another possible indicator of impeded oversight would be evidence that the CIA OIG was blocked from conducting or completing its desired reviews of the Program. The Study itself acknowledges the existence of at least 29 OIG investigations on detainee-related issues, including 23 that were open or had been completed in 2005.[141] We would also expect to see indications in completed OIG reports that the investigation was hampered by limited access to documents, personnel, or site locations necessary for completing such investigations. Again, according to the OIG's own reports, we found evidence that the OIG had extensive access to documents, personnel, and locations. For example, in its May 2004 Special Review of the RDI program, the CIA OIG reported that it was provided more than 38,000 pages of documents and conducted more than 100 interviews, including with the DCI, the Deputy Director of the CIA, the Executive Director, the General Counsel, and the Deputy Director of Operations. The OIG made site visits to two interrogation facilities [redacted] and reviewed 92 videotapes of the interrogation of Abu Zubaydah. The CIA IG's 2006 Audit is another good example of extensive access to documents, personnel, and locations. During this audit, the OIG not only conducted interviews of current and former officials responsible for CIA-controlled detention facilities, but it also reviewed operational cable traffic in extremely restricted access databases, reports, other Agency documents, policies, standard operating procedures, and guidelines pertaining to the detention program. The OIG also had access to the facilities and officials responsible for managing and operating three detention sites. The OIG was able to review documentation on site, observe detainees through closed-circuit television or one-way mirrors, and the IG even observed the transfer of a detainee aboard a transport aircraft. They even reviewed the medical and operational files maintained on each detainee in those locations.[142]

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[137] *See* CIA OIG, *Semi-Annual Report to the Director, Central Intelligence Agency*, July-December 2006, p. 5 (DTS 2007-0669); CIA OIG, *Semi-Annual Report to the Director, Central Intelligence Agency*, January-June 2006, p. 5 (DTS 2006-3195); CIA OIG, *Semi-Annual Report to the Director, Central Intelligence Agency*, July-December 2005, p. 5 (DTS 2006-0678); CIA OIG, *Semi-Annual Report to the Director, Central Intelligence Agency*, January-June 2005, p. 5 (DTS 2005-3140); CIA OIG, *Semi-Annual Report to the Director of Central Intelligence*, January-June 2004, p. 5 (DTS 2004-3307); and CIA OIG, *Semi-Annual Report to the Director of Central Intelligence*, January-June 2003, p. 5 (DTS 2003-3327); CIA Study Response, *Comments (TAB A)*, June 27, 2013, pp. 4-6; and 10; and CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, pp. 7-9.

[138] 50 U.S.C. 3517(d)(3)(E).

[139] *See* SSCI Transcript, *Hearing on the Central Intelligence Agency Rendition Program*, February 14, 2007, p. 24 (DTS 2007-1337).

[140] SSCI Transcript, *Hearing on the Central Intelligence Agency Rendition Program*, February 14, 2007, p. 25 (DTS 2007-1337).

[141] SSCI Study, Volume I, April 1, 2014, p. 899 n.6257. The CIA asserts that the "OIG conducted nearly 60 investigations" related to the CIA's Detention and Interrogation Program and that the OIG found the initial allegations in 50 of these investigations to be unsubstantiated or did not make findings warranting an accountability review. Of the remaining 10 investigations, one resulted in a felony conviction, one resulted in the termination of a

(U) Conclusion 10 (The CIA Released Classified Information on EITs to the Media)

(U) Conclusion 10 asserts, "[t]he CIA coordinated the release of classified information to the media, including inaccurate information concerning the effectiveness of the CIA's enhanced interrogation techniques."[143] This conclusion insinuates that there was something improper about the manner in which the CIA managed the process by which information about the Detention and Interrogation Program was disclosed to the media. We found the National Security Council Policy Coordinating Committee determined that the CIA would have "the lead" on the "Public Diplomacy issue regarding detainees."[144]

(U) The Study also repeats one of its main faulty claims—that the CIA released inaccurate information about the Program's effectiveness. Our examination of the record revealed that the CIA's disclosures were authorized and that the CIA's representations about the Program were largely accurate. Specifically, we found that the Study's flawed analytical methodology cannot negate the reality that the CIA's Detention and Interrogation Program set up an effective cycle of events whereby al-Qa'ida terrorists were removed from the battlefield, which had a disruptive effect on their current terrorist activities and often permitted the Intelligence Community to collect additional intelligence, which, in turn, often led back to the

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contractor and the revocation of his security clearances, and six led to Agency accountability reviews. CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 7.

[142] "CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification," July 14, 2006, APPENDIX A, page 1-2, DTS 2006-2793.

[143] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.

[144] Email from: [redacted] to: CIA attorney; subject: Brokaw interview: Take one; date: April 15, 2005, at 1:00 PM.

capture of more terrorists. We also found, with a few limited exceptions, that the CIA generally did a good job in explaining the Program's accomplishments to policymakers.

(U) CONCLUSION

The CIA called the detention program a "crucial pillar of US counterterrorism efforts, aiding intelligence and law enforcement operations to capture additional terrorists, helping to thwart terrorist plots, and advancing our analysis of the al-Qa'ida target."[145] We agree. We have no doubt that the CIA's detention program saved lives and played a vital role in weakening al-Qa'ida while the Program was in operation. When asked about the value of detainee information and whether he missed the intelligence from it, one senior CIA operator [redacted] told members, "I miss it every day."[146] We understand why.

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[145] Detainee Reporting Pivotal for the War Against al-Qa'ida, June 1, 2005, p. i.

[146] [redacted] Chambliss, [redacted] conversation between SSCI members and CIA officers, [redacted]

MINORITY VIEWS OF VICE CHAIRMAN CHAMBLISS JOINED BY SENATORS BURR, RISCH, COATS, RUBIO, AND COBURN[1]

(U) INTRODUCTION

(U) In January 2009, as one of his first official acts, President Obama issued three Executive orders relating to the detention and interrogation of terror suspects, one of which ended the Central Intelligence Agency's (CIA) Detention and Interrogation Program ("the Program" or "the Detention and Interrogation Program"). At the same time, there were ongoing calls from critics of the Program for the appointment of a special committee or independent commission to review the Program and "hold accountable" those involved. Against this backdrop, in March 2009, the Senate Select Committee on Intelligence ("SSCI" or "Committee") decided, by a vote of 14-1, to initiate a *Study of the Central Intelligence Agency's Detention and Interrogation Program,* hereinafter "the Study," and adopt Terms of Reference.[2] While most minority members supported the Study in the hope that a fair, objective, and apolitical look at the Program could put calls for an "aggressive"[3] and burdensome Commission to rest and might result in thoughtful and helpful recommendations for detention and interrogation policy going forward, Senator Chambliss was the sole Committee member to vote against the Committee conducting this review.[4] He believed then, as today, that vital Committee and Intelligence Community resources would be squandered and the Committee's ability to conduct effective intelligence oversight would be jeopardized by looking in the rear-view mirror and debating matters that were, in practice, already settled by Congress, the executive branch, and the Supreme Court.

(U) Indeed, by the time the Study began, Congress had passed two separate acts directly related to detention and interrogation issues, specifically the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA). The executive branch had terminated the CIA's program, ordered the closure of the Guantanamo Bay, Cuba, detention facility within one year, directed a review of detention and interrogation policies, and required that—except for the use of authorized, non-coercive interrogation techniques by federal law enforcement agencies—future interrogations be conducted in accordance with the U.S. Army Field Manual on Interrogation. The Supreme Court had decided *Rasul v. Bush,* 542 U.S. 466 (2004), *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), and *Boumediene v. Bush,* 553 U.S. 723 (2008), which established that detainees were entitled to habeas corpus review and identified certain deficiencies in both the DTA and MCA.

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[1] When these minority views were initially written in response to the original Study approved by the United States Senate Select Committee on Intelligence on December 13, 2012, the following members of the Committee signed on to them: Vice Chairman Chambliss joined by Senators Burr, Risch, Coats, Blunt, and Rubio. [[Please note that the double-bracketed text in this document is new explanatory text necessitated by substantive modifications to the Study's Executive Summary and Findings and Conclusions that were made ***after*** our June 20, 2014, Minority Views were submitted to the Central Intelligence Agency for the declassification review. We also note that these Minority Views are in response to, and at points predicated upon, the research and foundational work that underlie the Study's account of the CIA Detention and Interrogation Program. These Views should not be treated as an independent report based upon a separate investigation, but rather our evaluation and critique of the Study's problematic analysis, factual findings, and conclusions.]]

[2] SSCI Transcript, *Business Meeting to Discuss and Revote on the Terms of Reference for the Committee's Study of the CIA's Detention and Interrogation Program,* March 5, 2009, pp. 10-11 (DTS 2009-1916).

[3] *See e.g.*, SSCI Transcript, *Business Meeting to Discuss the Committee's Investigation of the CIA's Detention and Interrogation Program*, February 11, 2009, p. 69 (DTS 2009-1420) (description by Majority member of potential commission on this matter).

[4] SSCI Transcript, *Business Meeting to Discuss and Revote on the Terms of Reference for the Committee's Study of the CIA's Detention and Interrogation Program,* March 5, 2009, p. 10 (DTS 2009-1916).

(U) Nonetheless, a majority of Committee members agreed to review the Program, and after its inception, the Study proceeded in a bipartisan manner until August 24, 2009, when Attorney General Eric Holder announced that the Department of Justice (DOJ) had re-opened a preliminary review into whether federal criminal laws were violated in connection with the interrogation of specific detainees at overseas locations.[5] Once the Attorney General made this announcement, the minority correctly predicted that the criminal investigation would frustrate the Committee's efforts to conduct a thorough and effective review of the Program. Absent a grant of immunity, key CIA witnesses would likely follow the inevitable and understandable advice of counsel and decline to participate in any Committee interviews or hearings. This situation would make it very difficult for the Committee to comply with one of the key requirements in the Terms of Reference adopted for the Study, which specifically called for interviews of witnesses and testimony at hearings.

(U) Without interviews, the Study was essentially limited to a cold document review with more questions likely raised than answered. Although in a prior, related review of the destruction of CIA's interrogation video tapes, the Committee had wisely suspended its own review rather than forego interviews or potentially jeopardize a criminal investigation, inexplicably, this precedent was not followed in the case of the Study. When Chairman Feinstein decided to continue the Study despite these impediments to a full and accurate review, then-Vice Chairman Bond informed her that he had directed the minority staff to withdraw from further active participation.

(U) On August 30, 2012, Attorney General Holder announced the closure of the criminal investigation into the interrogation of certain detainees in the Detention and Interrogation Program.[6] This provided the Committee a window of opportunity to invite relevant witnesses in for interviews, but that course of action was not pursued.

(U) THE STUDY'S FLAWED PROCESS

(~~S~~) Now, five years later, the minority's prediction has come to pass. With the decision not to conduct interviews, the latest version of the Study is a [[6,682]]-page interpretation of documents that, according to the CIA, has cost the American taxpayer more than 40 million dollars and diverted countless CIA analytic and support resources.[7] After expending tens of thousands of Committee and CIA staff working hours, this Study does not even offer *a single*

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[5] DOJ, *Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees,* August 24, 2009, p. 1.

[6] *See* DOJ, *Statement of Attorney General Eric Holder on Closure of investigation into the Interrogation of Certain Detainees,* August 30, 2012, p. 1.

[7] CIA, Letter from V. Sue Bromley, Associate Deputy Director, November 6, 2012, p. 1 (DTS 2012-4143).

recommendation for improving our intelligence interrogation practices—even though the Terms of Reference expressly contemplated both findings and recommendations.[8] Rather, the Study purports to serve intelligence oversight interests by proffering 20 questionable and inflammatory conclusions attacking the CIA's integrity and credibility in developing and implementing the Program. To us, this Study appears to be more of an exercise of partisan politics than effective congressional oversight of the Intelligence Community.

(U) It is important to understand that the Executive Summary and the Findings and Conclusions which the Committee recently sent to the executive branch for a declassification review are not the same documents that were approved by the Committee during the 112th Congress or even at the April 3, 2014, declassification review business meeting. The original Executive Summary had 282 pages; the updated business meeting version had 479 pages; and the updated version transmitted to President Obama had 488 pages. Conversely, the original Findings and Conclusions shrank down from 95 pages to 31-page updated business meeting version, only to shrink further to the 20-page updated version that was transmitted to the President. The 20 conclusions originally approved by the Committee during the 112th Congress are not the same as the 20 conclusions sent for declassification review. For example, two of the original conclusions—Conclusions 2 and 11—were dropped and two other conclusions—Conclusions 9 and 19—were split in a manner that kept the total number of conclusions at 20. Although some remnants of Conclusions 2 and 11 can still be found in the Study, we believe that these conclusions were properly dropped as headline conclusions. While there have been numerous and repeated calls for the declassification of the Study since it was adopted on December 13, 2012,[9] these individuals and groups did not understand that they were calling for the release of a report that was still being re-written more than 15 months after it was first approved by the Committee.

(U) Failure to Interview Witnesses

(U) Although the Study asserts that it "is the most comprehensive review ever conducted of the CIA's Detention and Interrogation Program,"[10] it began to experience serious problems when the Attorney General decided to re-open the criminal inquiry into the Program in 2009. The Attorney General's decision resulted in the Committee's inability to interview key witnesses during the pendency of that inquiry and led to significant analytical and factual errors in the original and subsequently updated versions of the Study, a point we made in our original minority views and one that was strongly echoed in the CIA response.

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[8] *See* SSCI Review of the Central Intelligence Agency's Detention and Interrogation Program (SSCI Study), December 13, 2013 (SSCI Study), Volume I, pp. 1214-1215.

[9] On December 12, 2012, 26 retired generals and admirals urged the Committee to adopt the Study and make it public with as few redactions as possible. In early January 2013, Senators Feinstein, Levin, and McCain criticized the movie *Zero Dark Thirty* for its portrayal of the decade-long hunt for Usama Bin Ladin, because they believed it suggested that information obtained by torturing al-Qa'ida detainees aided in locating him. On November 26, 2013, the American Civil Liberties Union filed a lawsuit under the Freedom of Information Act to compel the CIA to release the SSCI Study and the CIA's June 27, 2013, response. On December 13, 2013, the Center for Victims of Torture released a statement supporting the release of the Study signed by 58 retired generals and admirals, national security experts, foreign policy experts, and religious leaders.

[10] SSCI Study, Executive Summary, December 3, 2014, p. 9. It would be more precise to assert that the SSCI Study is the most comprehensive *documentary* review ever conducted of the CIA's Detention and Interrogation Program.

(U) In a *Washington Post* opinion piece published on April 10, 2014, the current and former Chairmen of the Senate Select Committee on Intelligence admitted that:

> Although the committee was not able to conduct new interviews, it had access to and used transcripts from more than 100 interviews conducted by the CIA inspector general and other agency offices while the program was ongoing and shortly after it ended. Many of these transcripts were from interviews of the same people the committee would have talked to, with answers to the same questions that would have been asked. This included top managers, lawyers, counterterrorism personnel, analysts, interrogators and others at the CIA.[11]

While these statements are true and might lead someone to infer that these interview transcripts may have been adequate substitutes for conducting new interviews of these key personnel, the Study itself appears to reach the opposite conclusion:

> There are no indications in CIA records that any of the past reviews attempted to independently validate the intelligence claims related to the CIA's use of its enhanced interrogation techniques that were presented by CIA personnel in interviews and documents. As such, no previous review confirmed whether the specific intelligence cited by the CIA was acquired from a CIA detainee during or after being subjected to the CIA's enhanced interrogation techniques or if the intelligence acquired was otherwise unknown to the United States government ("otherwise unavailable"), and therefore uniquely valuable.[12]

We suppose that this critique is leveled against the CIA IG Special Report, at least in part, because the special report concluded that:

> The detention of terrorists has prevented them from engaging in further terrorist activity, and their interrogation has provided intelligence that has enabled the identification and apprehension of terrorists, warned of terrorist plots planned for the United States and around the world, and supported articles frequently used in the finished intelligence publications for senior policymakers and war fighters. *In this regard, there is no doubt that the Program has been effective.* Measuring the effectiveness of EITs, however, is more subjective process and not without some concern.[13]

The CIA OIG Special Report also noted that George Tenet, the Director of Central Intelligence (DCI), said he believed, "the use of EITs has proven to be extremely valuable in obtaining enormous amounts of critical threat information from detainees who had otherwise believed they were safe from any harm in the hands of Americans."[14]

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[11] http://www.washingtonpost.com/opinions/the-senate-report-on-the -cias-interrogation-program-should-be-made-public/2014/04/10/eeeb237a-c0c3-11e3-bcec-b71ee10e9bc3_story.html.

[12] SSCI Study, Executive Summary, December 3, 2014, p. 179.

[13] CIA, Office of Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities, (September 2001 – October 2003)*, May 7, 2004, p. 85 (DTS 2004-2710) (emphasis added).

(U) The Study cannot have it both ways. Either the CIA IG Special Review interview transcripts were adequate substitutes for new interviews or they were not. Conclusion 9 of the Study states that the "CIA impeded oversight by the CIA's Office of Inspector General."[15] Specifically, the Study alleges that "[d]uring the OIG reviews, CIA personnel provided OIG with inaccurate information on the operation and management of the CIA's Detention and Interrogation Program, as well as on the effectiveness of the CIA's enhanced interrogation techniques."[16] This conclusion seems to establish that the prior interview transcripts were inadequate substitutes for new interviews. While we do not agree with Conclusion 9, or any of the other conclusions examined in these views, it seems pretty clear that the lack of new interviews has prevented the Committee from conducting the comprehensive review that was envisioned in the original Terms of Reference. Unlike the Study, we are willing to acknowledge that our own analysis in these views was similarly hampered by the inability to interview key personnel who might be able to shed light on any documentary inconsistencies or inaccurate interpretations. Regardless, we remain convinced that the minority's non-partisan decision to withdraw from further active participation in the Study was the correct decision.

(U) Insufficient Member Review of the Approved Study

(U) Our concerns about the quality of the Study's analysis drove our efforts, before and during the Committee's business meeting on December 13, 2012, to implore the majority to give members sufficient opportunity to review the Study and submit it for review and comment by the Intelligence Community prior to a vote. Unfortunately, members were only given a little over three weeks to review the 2,148 pages released in the last tranche of the draft Study prior to the vote for adoption at the scheduled business meeting. This material provided the first look at the majority's analysis of the effectiveness of the interrogation program and became the core of the report adopted by the Committee. This last tranche contained nearly all of the most consequential analysis and—with the 282-page Executive Summary and the 95-pages of Findings and Conclusions provided to members for the first time just *three days* prior to the business meeting—comprised 40 percent of the adopted Study. The *day before* the December 13, 2012, business meeting, the Committee members received another "final version" of the report that made extensive changes to Study text, including the conclusions.[17] This unreasonably short time-period to review thousands of pages of text essentially precluded the possibility of formulating and offering amendments to the Study—had such an opportunity even been afforded to our Committee members.

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[14] CIA Office of Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, May 7, 2004, p. 88-89 (DTS 2004-2710).
[15] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[16] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[17] *See* SSCI Transcript, *Business Meeting to Consider the Report on the CIA Detention and Interrogation Program*, December 13, 2012, p. 25 (DTS 2013-0452).

(U) Aside from the sheer volume of the material, underlying the request for more time was the fact that almost all of the source material used to write the Study was located 40 minutes from Capitol Hill and thus not readily accessible to members and staff during the busiest month of the 112th Congress, when the Committee was simultaneously working on the Study, the Intelligence Authorization Act for Fiscal Year 2013, Foreign Intelligence Surveillance Act reauthorization, and its review of the Benghazi attacks. Nevertheless, the Chairman denied the Vice Chairman's request both prior to, and during, the Committee's business meeting for more time to review the draft Study.

(U) Insufficient Initial Fact Checking

(U) The 2,148-page tranche release, which specifically addressed the intelligence acquired from the Program and the CIA's representations regarding the effectiveness of the Program, also made serious allegations attacking the honesty and integrity of the CIA as an institution and of many of its senior and junior officers. In preparing this part of the Study, the majority selected 20 cases in which they claim the CIA inaccurately described information acquired from the interrogation program. This is ironic, since we found the Study itself consistently mischaracterized CIA's analysis. In each of these 20 cases, the Study absolutely and categorically dismissed any correlation previously drawn by the CIA between the Detention and Interrogation Program and the capture of terrorists, thwarting of terrorist plots, or the collection of significant intelligence. There is no ambiguity in the Study's indictment: in every one of these cases, the CIA and its officers lied—to Congress, to the White House, to the Department of Justice, and ultimately to the American people.

(U) We believe that the serious nature of these original conclusions required, as the Committee has done in the past with reports of such magnitude, submitting the Study to the Intelligence Community for review and comment before the vote. This deviation not only hampered the Committee's efforts to approve a factually accurate report, but it deprived the Intelligence Community of its traditional opportunity to provide important feedback to the Committee prior to the approval of the Study. Moreover, the near absence of any timely interviews of relevant Intelligence Community witnesses during the course of this Study was a warning flag that should have signaled the increased need for initial fact-checking prior to the Study's adoption.

(U) The Committee has a long-standing practice of sending reports to the executive branch for review dating back to the Church Committee reports in 1975.[18] More recently, in 2004, the Committee provided the draft report on the *U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq* to the Intelligence Community for fact-checking. The Committee wanted to ensure that a report of that magnitude, which purported to tell the Intelligence Community why years of analysis on Iraq's weapons of mass destruction programs was wrong, needed to be unquestionably accurate and not subject to challenge by the Intelligence Community. Only after the Intelligence Community provided its feedback and after the Committee held a hearing with the Director of Central Intelligence to give him the chance to comment on the record, did the Committee vote on the report. Thus, both the Committee and the Intelligence Community had a full and fair opportunity to review and check the report before a vote and before members provided additional or minority views. Also, unlike this Study, the Committee had conducted over 200 interviews with Intelligence Community witnesses who, over the course of a year, provided the investigative staff with information, insight, and clarification that could not be found in the documents alone.

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[18] *See* Loch K. Johnson, *A Season of Inquiry: The Senate Intelligence Investigation*, University Press of Kentucky, Lexington, 1985, p. 108.

(U) Unfortunately, in spite of a specific request at the December 2012 business meeting to follow these precedents, the majority refused to do so. Adhering to our established precedent for a report of this importance would have sent a clear signal to the entire Intelligence Community that the Committee's primary goal was to provide an accurate accounting of the Detention and Interrogation Program. Had the CIA been allowed to do so, the Study could have been modified, if necessary, or if not, members would at least have had the benefit of understanding the CIA's perspective prior to casting their votes. Yet, because the Committee approved the Study as final, before the Study had been sent to the Intelligence Community for review, the CIA was placed in the unenviable position—not of fact-checking—but of critiquing the Study of its own oversight Committee. In doing so, the Committee significantly undermined and diminished its own credibility.

(U) The CIA Response

(U) On June 27, 2013, the CIA provided a 130-page response to the original Study approved during the 112th Congress. The CIA also provided a two-page response to our initial minority views.[19] The purpose of the CIA response was to focus "on the Agency's conduct of the RDI program, in the interest of promoting historical accuracy and identifying lessons learned for the future, with the ultimate goal of improving the Agency's execution of other covert action programs."[20] The CIA noted, however, that a comprehensive review of the Study's almost 6,000 pages was an impossible task given the time allotted. They chose to concentrate their efforts on the Study's 20 conclusions and that part of the Study that assessed the value of the information derived from the CIA's RDI activities. When the CIA was able to review certain portions of the Study in detail, it found that the Study's accuracy "was encumbered as much by the authors' interpretation, selection, and contextualization of the facts as it was by errors in their recitation of the facts, making it difficult to address its flaws with specific technical correction."[21]

(U) Consistent with our own observations, the CIA response found that, while the Study has all the appearances of an authoritative history of the CIA's Detention and Interrogation Program and contains an impressive amount of detail, it fails in significant and consequential ways to correctly portray and analyze that detail. The CIA attributed these failures to two basic limitations on the authors: (1) a methodology that relied exclusively on a review of documents with no opportunity to interview participants; and (2) an apparent lack of familiarity with some of the ways the CIA analyzes and uses intelligence.[22]

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[19] We modified these minority views based upon the CIA's input.
[20] CIA Study Response, *Comments (TAB A)*, June 27, 2013, p. 1.
[21] CIA Study Response, *Comments (TAB A)*, June 27, 2013, pp. 1-2.
[22] CIA Study Response, *Comments (TAB A)*, June 27, 2013, p. 2.

(U) Unlike the Study, the CIA response actually offered eight specific recommendations for improving future covert actions: (1) improve management's ability to manage risk by submitting more covert action programs to the special review process currently used [redacted] (2) better plan covert actions by explicitly addressing at the outset the implications of leaks, an exit strategy, lines of authority, and resources; (3) revamp the way in which CIA assesses the effectiveness of covert actions; (4) ensure that all necessary information is factored into the selection process for officers being considered for the most sensitive assignments; (5) create a mechanism for periodically revalidating Office of Legal Counsel guidance on which the Agency continues to rely; (6) broaden the scope of accountability reviews; (7) improve recordkeeping for interactions with the media; and (8) improve recordkeeping for interactions with Congress.[23] We believe the CIA should implement these recommendations.

(U) The Summer Meetings

(U) During the summer and early fall of 2013, SSCI staff spent about sixty hours with CIA personnel who had led and participated in the preparation of the CIA's response to the Study. The purpose of these meetings was to discuss factual discrepancies and areas of disagreement between the SSCI Study and the CIA Study Response. These exchanges would have been much more productive if they had occurred *before* the Study was approved by the Committee in December 2012.

(U) The majority staff did not start these sessions with discussions about the substance of the Study or the CIA's response. Rather, they began by spending an inordinate amount of time questioning the CIA personnel about the process by which the CIA had prepared its response to the Study. Eventually, the discussions turned to more substantive issues. Prior to each session, the majority staff typically determined the order in which the Study conclusions would be discussed. Although the CIA and minority staff expressed repeated interest in discussing some of the more problematic conclusions and underlying "effectiveness" case studies, the majority staff proceeded with discussions of the least controversial portions of the Study.

(U) Our staff reported to us that the general tenor of these sessions was "unpleasant." Instead of giving the CIA an opportunity to help improve the Study by explaining the errors and factual inaccuracies identified in their response, the majority staff spent the vast majority of these sessions in "transmit" rather than "receive" mode. When the discussions finally turned to the "effectiveness" case studies, the majority staff spent a significant portion of the remaining time explaining its "methodology" and reading large portions of the report into the record. The CIA initially made arrangements to have certain key analysts participate in these discussions to help the Committee understand the meaning of certain parts of the historical documentary record. Unfortunately, these analysts were often kept waiting outside of the meeting room while the majority staff plowed through its set agenda with the senior CIA personnel. Some of those waiting analysts never received an opportunity to participate. Seeing the writing on the wall, the lead CIA personnel eventually stopped bringing the pertinent analysts along, which did not seem to concern the majority staff. The most problematic case studies were summarily discussed in just a few hours during the very last session.

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[23] CIA Study Response, *Comments (TAB A)*, June 27, 2013, pp. 17-18.

(U) Given the unproductive manner in which these meetings were conducted, the Committee missed a significant opportunity to improve its Study through a better understanding of the CIA's analytical and operational practices that produced the documentary record upon which the Study was based. We commend the CIA personnel who patiently and professionally participated in these unproductive sessions and thank them for their dedicated service to our Nation.

(U) The Clash Over the Panetta Review

(U) On January 15, 2014, Chairman Feinstein and Vice Chairman Chambliss met with the Director of the Central Intelligence Agency (CIA), John Brennan, at his urgent request. At this meeting, Director Brennan disclosed that the CIA conducted a "search"[24] of a CIA computer network used by the Committee. The CIA established this network at a CIA facility in 2009 pursuant to written agreements between the Committee and then-Director Leon Panetta. It is the understanding of the Committee that the CIA conducted the "Panetta Internal Review" for the purpose of summarizing for CIA leadership the contents of documents likely to be reviewed by the Committee during its review.

(U) As evidenced by repeated unauthorized disclosures in the news media, the production and release of the Study has been marred by the alleged misconduct of CIA employees and majority staff as it pertains to the so-called "Panetta Internal Review." Regardless of differences of opinion and policy, the relationship between the CIA and this Committee should not have escalated to this level of embarrassment and provocation. It is one of the most delicate oversight relationships in the Federal government and must be treated as such at all times. It would be a shame if this incident tarnished the reputation of the Committee or the CIA to such a degree that the normally constructive cooperation between the CIA and the Committee is scarred beyond repair.

(U) Typically, matters such as these are handled discreetly through the accommodation process and would involve internal investigations or joint inquiries. These options were not available in this situation. Presently, the Department of Justice, the CIA Inspector General, and the U.S. Senate Sergeant at Arms are conducting ongoing investigation into these matters. Nonetheless, for the purpose of these Views, it is worth noting the following observations:

> (U) First, Committee majority staff knowingly removed the Panetta Internal Review, a highly classified, privileged CIA document, from a CIA facility without authorization and in clear violation of the existing agreed-upon procedures by the Committee and the CIA.

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[24] The 2009 written agreement permitted CIA access to the network for technical support, but at the time of this writing, the forensic details of the CIA "search" are unknown.

(U) Second, although the Committee certainly needs to understand the facts and circumstances of whether the CIA acted inappropriately when it allegedly "searched" a Committee shared drive on certain CIA computers, this issue is separate and distinct from the earlier incident involving the unauthorized removal of the Panetta Internal Review document from the CIA facility. The subsequent "search" does not excuse or justify the earlier staff behavior or vice versa.

(U) Third, the Panetta Internal Review document that was brought back to Committee spaces was not handled in accordance with Committee protocols. Committee Rule 9.4 states, "Each member of the Committee shall at all times have access to all papers and other material received from any source." It appears that the existence, handling, and the majority's possession of this privileged document were not disclosed to the minority for months, and might never have been revealed but for the public disclosures about the document which led to the January meeting with Director Brennan.

(U) Finally, given the CIA's repeated assertions of privilege concerning the document since the January meeting with Director Brennan, at no time has a minority member or staff handled the document or reviewed its contents.

(U) The Declassification Review Business Meeting

(U) The majority's practice of providing insufficient time for member review of the report's contents was repeated just prior to the Committee's April 3, 2014, business meeting to consider whether to send the report to the executive branch for a declassification review. On April 1, 2014, updated versions of the Study's three volume report, totaling 6,178 pages, were made available on a Committee shared drive. The majority staff did not release its third updated versions of the Executive Summary and Findings and Conclusions *until the day before the business meeting*. Finally, *four days after the business meeting*, the Chairman transmitted to President Obama one last revised version of the updated Executive Summary and Findings and Conclusions.[25]

(U) THE STUDY'S PROBLEMATIC ANALYSIS

(U) As previously discussed, the flawed process used for the approval of the original Study and this updated version resulted in numerous factual errors. These factual errors were further compounded by the Study's numerous analytical shortfalls, which ultimately led to an unacceptable number of incorrect claims and invalid conclusions. This section will generally highlight many of the analytical shortcomings we found in the Study. The next section will then specifically examine some of the Study's most problematic conclusions, including our analysis of the factual premises, claims, and flawed analytical methodology upon which many of these faulty conclusions were based.

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[25] The citations to the updated Executive Summary and Findings and Conclusions in these minority views have been revised to match up with the versions that were transmitted to the President. The citations to the updated three-volume report are keyed to the versions that were placed on the Committee's shared drive.

(U) When this Committee reviews the Intelligence Community's analytic products, it does so with the expectation of adherence to certain analytic integrity standards.[26] These standards "act as guidelines and goals for analysts and managers throughout the Intelligence Community who strive for excellence in their analytic work practices and products."[27] Although these specific analytic standards do not technically apply to this Committee's oversight reporting, the aspirational analytical values they represent are applicable to the Committee's analytical expectations for its own oversight work product. The examples offered in this section illustrate some of the Study's general analytic deficiencies concerning objectivity, independence from political considerations, timeliness, the use of all available intelligence sources, and consistency with proper standards of analytic tradecraft. These examples also serve as a useful backdrop for our specific analysis and critique of some of the Study's erroneous conclusions and claims.[28]

(U) Inadequate Context

~~(TS~~[redacted]~~NF)~~ We begin, however, with a review of the context in which the CIA Program was initiated and operated. Although there is no specific, Intelligence Community analytic standard addressing context, it is important in any analysis or report to provide appropriate context so that the reader is able to understand why events transpired as they did. The Study does very little to provide such context—it is entirely silent on the surge in terrorist threat reporting that inundated the Intelligence Community following the September 11, 2001, terrorist attacks by al-Qa'ida, and it makes no mention of the pervasive, genuine apprehension about a possible second attack on the United States that gripped the CIA in 2002 and 2003. Rather, the Study begins by coldly describing the September 17, 2001, covert action Memorandum of Notification (MON) signed by the President authorizing the CIA to detain "persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities," as if the attacks that had killed nearly 3,000 Americans just six days prior, were incidental to the extraordinary authorities granted under the MON, and all other events described in the Study.[29] They were not. In our collective view, to depict judgments and decisions arising from the administration of this program as having been made in a vacuum, or somehow in isolation of these events, is both unrealistic and unfair.

(U) During our review of the materials provided by the CIA for the Study, we could clearly discern a workforce traumatized by an intelligence failure that had left thousands of Americans dead, but also galvanized by the challenge of working on the frontline to ensure such an attack never occurred again. In the early years of this effort, there were constant threats of new attacks, and endless leads to track down. CIA and other Intelligence Community personnel worked relentlessly, day in and day out, to follow up on every one.

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[26] In 2004, the SSCI was instrumental in including in the Intelligence Reform and Terrorism Prevention Act. P.L. 108-458, a provision mandating that the Director of National Intelligence "ensure the most accurate analysis" by implementing policies and procedure "to encourage sound analytic tradecraft."

[27] Intelligence Community Directive Number 203, *Analytic Standards* (effective June 21, 2007), p. 1.

[28] *See* Intelligence Community Directive Number 203, *Analytic Standards* (effective June 21, 2007), p. 2.

[29] *See* SSCI Study, Executive Summary, December 3, 2014, p. 11.

(U) There is no doubt that the CIA Program—executed hastily in the aftermath of the worst terrorist attack in our Nation's history—had flaws. The CIA has admitted as much in its June 27, 2013, response to the Study. However, the Study's conclusion that the use of enhanced interrogation techniques was ineffective does not comport with a massive documentary record that clearly demonstrates a series of significant counterterrorism operational successes. That same documentary record also undercuts the Study's flawed conclusions that the CIA "impeded" congressional and executive branch oversight of the Program, as well as the counterterrorism and diplomatic missions of other federal entities. Our review of the record revealed this conclusion—one the Study twists itself in knots to avoid—that the CIA Program was a vital source of critical intelligence that led to the detention of multiple terrorists and helped keep America safe.

(U) Whether the CIA should operate a clandestine detention program and whether it is in America's interests to interrogate suspected terrorists using methods beyond those in the U.S. Army Field Manual are valid questions worthy of serious debate. Unfortunately, the utility of Study's considerable work product in such a debate is seriously undermined by its disregard of the Program's historical context and its reliance upon an unrealistic analytical methodology, which appears to have been designed to exclude from consideration any inconvenient facts not fitting within the Study's preconceived view that such enhanced methods produced nothing of intelligence value. Although there are a number of findings in the Study with which we agree, our own review of the documentary record compelled us to focus our discussion in these minority views on these inconvenient facts that invalidate much of the revisionist history that is being advocated by many of the Study's findings and conclusions.

(U) Inadequate Objectivity

~~(TS~~[redacted]~~NF)~~ The standard of objectivity requires that analysts perform their analytic functions from an unbiased perspective—analysis "should be free of emotional content, give due regard to alternative perspectives, and acknowledge developments that necessitate adjustments to analytic judgments."[30]

~~(TS~~[redacted]~~NF)~~ We were disappointed to find the updated version of the Study still contains evidence of strongly held biases by the authors—a point emphasized by John Brennan prior to his confirmation as the Director of the CIA, when he told Vice Chairman Chambliss that, based on his reading of the originally approved Executive Summary and the Findings and Conclusions, the Study was "not objective" and was a "prosecutor's brief," "written with an eye toward finding problems." We still agree with Director Brennan's assessments. We also agree with the criticism he relayed from Intelligence Community officials that it was written with a "bent on the part of the authors" with "political motivations." We similarly found these problems, but more importantly, we found that those biases were not only present, but they resulted in faulty analysis, serious inaccuracies, and misrepresentations of fact in the Study.

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[30] Intelligence Community Directive Number 203, *Analytic Standards* (effective June 21, 2007), p. 2.

~~(TS~~[redacted]~~NF)~~ For example, there were instances when detainees told their interrogators that they had provided everything they knew or denied that they were terrorists, and the Study seems to take them at their word. In June 2002, Abu Zubaydah told his interrogators, "What I have, I give it all . . . I have no more."[31] The Study seems to have bought into this lie when it subsequently concluded, "At no time during or after the aggressive interrogation phase did Abu Zubaydah provide the information that the CIA enhanced [interrogations] were premised upon, specifically, 'actionable intelligence about al-Qa'ida operatives in the United States and planned al-Qa'ida lethal attacks against U.S. citizens and U.S. interests.'"[32]

~~(TS~~[redacted]~~NF)~~ In fact, Abu Zubaydah did provide actionable intelligence that helped disrupt planned al-Qa'ida lethal attacks against U.S. citizens and interests following his June 2002 denials of having more information. Although our review of the documentary record revealed that Abu Zubaydah's first period of "aggressive" interrogation actually began on April 15, 2002,[33] he certainly provided valuable intelligence *after* his second period of aggressive interrogation began on August 4, 2002.[34] For example, on August 20, 2002,[35] Abu Zubaydah provided information about how he would go about locating Hassan Ghul and other al-Qa'ida associates in Karachi. This information caused [redacted] Pakistani authorities to intensify their efforts and helped lead them to capture Ramzi bin al-Shibh and other al-Qa'ida associates during the Karachi safe house raids conducted on September 10-11, 2002."[36] These arrests effectively disrupted a then ongoing plot to bomb certain named hotels in Karachi, Pakistan.[37] In April 2002, Khalid Shaykh Mohammad (KSM) confirmed the hotels plot had been directed against U.S. citizens and interests when he told his interrogators that the hotels had been selected because they were frequented by American and German guests.[38]

~~(TS~~[redacted]~~NF)~~ The Study's lack of objectivity is further illustrated in the acceptance as factual those CIA documents that support its findings and conclusions, and the dismissal of documents contradictory to its findings and conclusions as being "inaccurate" or "misrepresentations." For example, the Study cites to a finished intelligence product published in 2006 as support for its stunning claim that the "CIA later concluded that Abu Zubaydah was not a member of al-Qa'ida."[39] In fact, the product states: "Al-Qa'ida rejected Abu Zubaydah's request ***in 1993*** to join the group and that Khaldan was not overseen by Bin Ladin's organization."[40] The Study fails to state that the interrogation of this supposed "non-member" resulted in 766 sole-source disseminated intelligence reports by the Study's own count.[41]

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[31] SSCI Study, Volume I, March 31, 2014, p. 113; CIA, [redacted] 10487, June 18, 2002, p. 4.
[32] SSCI Study, Volume I, March 31, 2014, p. 146.
[33] *See infra*, p. 34.
[34] *See* CIA, [redacted] 10586, August 4, 2002, pp. 2-5.
[35] *See* CIA, *Captures Resulting From Detainee Information: Four Case Studies*, November 26, 2003, p. 2; CIA, ALEC [redacted] August 29, 2002, pp. 2-7.
[36] *See infra*, pp. 38-41.
[37] *See infra*, pp. 45-47.
[38] *See* [REDACTED] 34513, March 5, 2003, p. 2.
[39] SSCI Study, Executive Summary, December 3, 2014, p. 410 n.2301.
[40] CIA, *Countering Misconceptions About Training Camps in Afghanistan, 1990-2001*, August 16, 2006, p. 2 (DTS 2006-3254) (emphasis added).). This document is attached as Appendix I, *see infra*, p. I-1.
[41] *See* SSCI Study, Volume III, March 31, 2014, pp. 282-283.

Ironically, this intelligence product was written based on "information from detainees and captured documents"—including from Abu Zubaydah.[42]

~~(TS~~[redacted]~~NF)~~ Another indication of the Study's lack of objectivity is its tendency to state its conclusions in such a manner as to be technically accurate, but factually misleading. For example, in the Executive Summary, the Study authors state,

> a review of CIA records found no connection between Abu Zubaydah's reporting on Ramzi bin al-Shibh and Ramzi bin al-Shibh's capture. CIA records indicate that Ramzi bin al-Shibh was captured unexpectedly—on September 11, 2002, when Pakistani authorities, [redacted], were conducting raids targeting Hassan Ghul in Pakistan."[43]

The implication is that none of the information Zubaydah provided pursuant after enhanced interrogation led to al-Shibh's capture. What is ignored here is the exact expression of Zubaydah's role in al-Shibh's apprehension, captured in a CIA internal communication, where it is made clear, "[Zubaydah's] knowledge of al-Qa'ida lower-level facilitators, modus operandi and safehouses, which he shared with us as a result of EITs . . . played a key role in the ultimate capture of Ramzi Bin al-Shibh."[44] Zubaydah's reporting on how to locate terrorists in Pakistan, by trying to find another terrorist, is what led to bin al-Shibh's arrest.[45]

~~(TS~~[redacted]~~NF)~~ The Study's uneven treatment of key U.S. officials throughout the report, attacking the credibility and honesty of some, while making little mention of others, also lacked objectivity. For example, former Director George Tenet led the CIA at the outset of the Program, during a period the Study contends was characterized by mismanagement. Tenet authorized the enhanced interrogation techniques, and if the Study is to be believed, headed an organization that withheld information from and misled policymakers in the executive branch and Congress. He is mentioned 62 times in the updated version of the Study's Executive Summary. By comparison, former Director Michael Hayden joined the CIA in 2006, after all but two detainees entered the Program and the most severe EITs were no longer in use. He was also the only Director to brief the Program to all members of the congressional oversight committees. Yet, Director Hayden is mentioned 172 times in the Executive Summary, where he is disparaged numerous times. For example, in Conclusion 18, which alleges the CIA marginalized criticisms and objections concerning the Detention and Interrogation Program, the Executive Summary states: "CIA Director Hayden testified to the Committee that 'numerous false allegations of physical and threatened abuse and faulty legal assumptions and analysis in the [ICRC] report undermine its overall credibility.'"[46] The Study also states:

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[42] CIA, *Countering Misconceptions About Training Camps in Afghanistan, 1990-2001,* August 16, 2006, p. i (DTS 2006-3254).

[43] SSCI Study, Executive Summary, December 3, 2014, p. 318.

[44] CIA Memo from Pavitt to CIA IG on Draft Special Review, February 27, 2004, pp. 13-14. For a more detailed examination of this issue, *see infra,* pp. 38-42.

[45] *See* CIA, ALEC [redacted] August 29, 2002, pp. 2-3; CIA, ALEC [redacted] September 11, 2002, p. 2.

[46] SSCI Study, Findings and Conclusions, December 3, 2014, p. 15.

> After multiple Senators had been critical of the program and written letters expressing concerns to CIA Director Michael Hayden, Director Hayden nonetheless told a meeting of foreign ambassadors to the United States that every Committee member was 'fully briefed,' and that '[t]his is not CIA's program. This is not the President's program. This is America's program.'[47]

Beyond the imbalance with which some officials are treated in the Study, we are particularly concerned that such treatment will send the perverse message to future CIA Directors and the CIA that they will face less criticism if they keep information limited to only a few members.

(U) Indications of Political Considerations

(U) The analysis and products of the Intelligence Community are supposed to remain independent of political consideration, leaving policy and political determinations to the policymakers and politicians. It follows that, Intelligence Community analysts "should provide objective assessments informed by available information that are not distorted or altered with the intent of supporting or advocating a particular policy, political viewpoint, or audience."[48] Although some might think that this analytic standard would have little applicability to Congress, which is an inherently political body, in the context of congressional oversight of the Intelligence Community, our Committee was designed to function in a bipartisan manner. Thus, this analytical standard is useful in assessing whether a particular Committee oversight report was crafted in a bipartisan manner or suffers from indications of political considerations.

~~(TS~~[redacted]~~NF)~~ Far from being free of political consideration, the Study uses quotes from minority members out of context to suggest they supported positions in the Study, that they in fact did not, and entirely omits contradictory comments. For example, the Study selectively quotes from a February 11, 2009, meeting organized around the discussion of a report prepared by majority staff, evaluating the detention and interrogation of two detainees. The Study indicates that "a Committee staff" presented the report, and quotes Chairman Feinstein saying the review represented, "the most comprehensive statement on the treatment of these two detainees."[49] What the Study fails to note, however, is that Vice Chairman Bond clarified the draft was "the work of two majority staff members," and that neither he, "nor any minority staff was informed of the work going into the memo over the course of the last year." He also noted that the minority had offered some input, but had not been able to review the document thoroughly, or fact check it, and therefore did not view the report as a bipartisan document. Moreover, he noted that the minority staff had just received the remarks the majority staff had prepared, several points of which were subsequently disputed by minority staff during the meeting.[50]

~~(TS~~[redacted]~~NF)~~ The Study also claims that a minority member's comments during the meeting, "expressed support for expanding the Committee investigation to learn more about the program."[51] In fact, the member was explaining to two majority members, who were already talking about declassifying a report they had just seen, why he would like to know a lot more "before I pass judgment" on the CIA officers described in the document. Suggesting doubt about the allegations in the document, he commented, "It's hard to believe, and I can't help but think that there isn't more here."[52]

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[47] SSCI Study, Executive Summary, December 3, 2014, p. 448.

[48] Intelligence Community Directive Number 203, *Analytic Standards* (effective June 21, 2007), p. 2.

[49] SSCI Study, Volume I, March 31, 2014, p. 1211.

[50] *See* SSCI Transcript, *Business Meeting to Discuss the Committee's Investigation of the CIA's Detention and Interrogation Program*, February 11, 2009, pp. 6-7 and 33-34 (DTS 2009-1420).

(U) Lack of Timeliness

(U) The analytic integrity standard of timeliness is predicated on maximizing the impact and utility of intelligence, and it encourages the Intelligence Community to produce relevant analysis that effectively informs key policy decisions.[53] The "effectively informs" aspect of this notion means that intelligence products which are published too near to a decision point, let alone after it, are of diminishing or negligible value. This same susceptibility holds true for intelligence oversight reports.

~~(TS~~[redacted]~~NF)~~ On January 22, 2009, President Obama issued Executive Order 13491, which required the CIA to "close as expeditiously as possible any detention facilities that it currently operates and . . . not operate any such detention facility in the future." The Executive Order prohibited any U.S. government employee from using interrogation techniques other than those in the Army Field Manual 2-22.3 on Human Intelligence Collector Operations.[54] The Terms of Reference for the Study were approved by the Committee on March 5, 2009.[55] However, the original Study was adopted by the Committee on December 13, 2012—approximately three years and nine months after the approval of the Terms of Reference.[56] On April 3, 2014—*more than five years after* the Terms of Reference were approved—the Committee sent updated versions of the previously approved Executive Summary and Findings and Conclusions to the executive branch for a declassification review.

~~(TS~~[redacted]~~NF)~~ This Study purports to represent "the most comprehensive review ever conducted of the CIA's Detention and Interrogation Program."[57] Certainly, there is some utility in the exercise of studying an intelligence program so expansive and intricate, that the document production phase alone lasted more than three years, and produced more than six million pages of material.[58] Normally, a review of this magnitude might be expected to yield valuable lessons learned and best practices, which might then be applied to future intelligence programs. However, no version of the Study has ever contained any recommendations.[59] Moreover, there are no lessons learned, nor are there any suggestions of possible alternative measures. This absence of Committee recommendations is likely due to the fact that the key policy decisions about the CIA's Detention and Interrogation Program were decided years ago by President Obama in 2009. Despite its massive size, the Study does little to effectively inform current policymakers, but rather makes a number of inaccurate historical judgments about the CIA's Program. For these reasons, we conclude that the Study is not timely.

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[51] SSCI Study, Volume I, March 31, 2014, p. 1213.

[52] SSCI Transcript, *Business Meeting to Discuss the Committee's Investigation of the CIA's Detention and Interrogation Program*, February 11, 2009, pp. 48-51 (DTS 2009-1420).

[53] *See* Intelligence Community Directive Number 203, *Analytic Standards* (effective June 21, 2007), p. 2.

[54] Executive Order 13491, "Ensuring Lawful Interrogation," January 22, 2009, Section 3(b), p. 2.

[55] *See* SSCI Transcript, *Business Meeting to Discuss and Revote on the Terms of Reference for the Committee's Study of the CIA's Detention and Interrogation Program*, March 5, 2009, p. 11 (DTS 2009-1916).

[56] *See* SSCI Transcript, *Business Meeting to Consider the Report on the CIA Detention and Interrogation Program*, December 13, 2012, p. 74 (DTS 2013-0452).

[57] SSCI Study, Executive Summary, December 3, 2004, p. 9. A more accurate statement would have been, "the most comprehensive *documentary* review ever conducted of the CIA's Detention and Interrogation Program."

[58] SSCI Study, Executive Summary, December 3, 2004, p. 9.

(U) Inadequate Use of Available Sources of Intelligence

(U) Despite the millions of records available for the Study's research, we found that important documents were not reviewed and some were never requested. We were surprised to learn that the e-mails of only 64 individuals were requested to support the review of a program that spanned eight years and included hundreds of government employees. Committee reviews of this magnitude typically involve interviewing the relevant witnesses. Here, these relevant witnesses were largely unavailable due to the Attorney General's decision to re-open a preliminary criminal review in connection with the interrogation of specific detainees at overseas locations. When DOJ closed this investigation in August 2013, however, the Committee had a window of opportunity to invite these relevant witnesses in for interviews, but apparently decided against that course of action. The lack of witness interviews should have been a clear warning flag to all Committee members about the difficulty of completing a truly "comprehensive" review on this subject.

(U) Exhibits Poor Standards of Analytic Tradecraft

(U) Compounding its disconcerting analytic integrity challenges, the Study's content is littered with examples of poor analytic tradecraft, across several critical measures of proficiency for authoring intelligence products. Here we provide some examples of the Study's poor analytic tradecraft.

(U) *Inadequately Describes the Quality and Reliability of Sources*

~~(TS~~[redacted]~~NF)~~ Analysis that adheres to Intelligence Community tradecraft standards properly describes the quality and reliability of sources. Analysis that misrepresents or misinterprets the quality of source material compromises the integrity of the resulting analysis. At points, the Study relies upon "draft talking points" documents as being authoritative.[60] Doing so raises questions about the credibility of the assessment being drawn based on such a source, because draft talking points are prepared by staff for a senior leader and it is often difficult to ascertain, absent interviews, whether all, some, or none of the information contained in talking points was even used by the senior leader.

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[59] At least the CIA's June 27, 2013, response to the Study identified eight recommendations derived from the lessons it had learned related to the Detention and Interrogation Program. *See* CIA Study Response, *Comments (Tab A)*, June 27, 2013, pp. 16-17.

[60] SSCI Study, Executive Summary, December 3, 2014, pp. 143 and 196.

~~(TS~~[redacted]~~NF)~~ We found frequent examples of citations that pointed to documents that did not discuss the material in question, were taken out of context, or did not accurately reflect the contents of the cited source documents—in some cases changing the meaning entirely. For example, the Study states that a review by the CIA Inspector General (IG) "uncovered that additional unauthorized techniques were used against" a detainee, but the Inspector General report actually said it "heard allegations" of the use of unauthorized techniques and said, "For all of the instances, the allegations were disputed or too ambiguous to reach any authoritative determination about the facts."[61] In another case, the Study states: "By early October 2002, the CIA completed a search of the names identified in the 'perfume letter' in its databases and found most of the individuals who 'had assigned roles in support of the operation' were arrested by Pakistani authorities during the raids."[62] This inaccurate paraphrase is different from the actual language of the quote, which states, "it appears that most of the detainees arrested on [September 11, 2002], had assigned roles in support of the operation outlined in the 'perfume" letter."[63] After explaining that a detainee had already admitted that "purchasing perfumes" likely referred to purchasing or making poisons, the cable states that, "[O]ur concern over this letter is heightened because of the identities of the individuals involved in the operation it outlines."[64] The Study's inaccurate paraphrase appears to minimize the remaining threat, while the cable itself indicates heightened concern. In hindsight, it appears that while the September 11, 2002, safe house raids helped to derail the Karachi hotels plot, the threat evolved into a planned attack on the U.S. consulate in Karachi by Ammar al-Baluchi and Khallad bin Attash, who were not captured during the September 2002 safe house raids.[65]

(U) *Inadequate Caveats About Uncertainties or Confidence in Analytic Judgments*

~~(TS~~[redacted]~~NF)~~ Proper tradecraft requires that the strength of an analytic judgment should be expressed when appropriate, through confidence level statements and the identification of uncertainty. This is an important check on analytical judgments that provides a key safeguard for policy makers. Many of the Study's conclusions and underlying claims are offered as matters of unequivocal fact. As an example, the Study asserts "CIA officers conducted no research on successful interrogation strategies during the drafting of the MON, nor after it was issued."[66] Proving a negative is often very difficult, and in this particular case it is difficult to understand how such an absolute assertion can be made without interviewing the affected witnesses or even citing to one documentary source that might support such a claim.

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[61] *Compare* SSCI Study, Volume I, March 31, 2014, p. 229, *with* CIA Office of Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 - October 2003)*, May 7, 2004, p. 41 (DTS 2004-2710). [[This tradecraft error was partially corrected in the November 26, 2014, version of the Executive Summary by editing the offending sentence to read, "The Office of Inspector General later *described* additional *allegations* of unauthorized techniques used against . . . ." (emphasis added). *Compare* SSCI Study, Executive Summary, April 3, 2014, p. 67 *with* SSCI Study, Executive Summary, December 3, 2014, p. 70.]]

[62] SSCI Study, Executive Summary, December 3, 2014, p. 242. The Study cites to CIA, ALEC 188560, October 3, 2002, but the quoted language actually appears in CIA, ALEC 188565, October 3, 2002, p. 2.

[63] CIA, ALEC [redacted] October 3, 2002, p. 2.

[64] CIA, ALEC [redacted] October 3, 2002, pp. 2-3.

[65] CIA, CIA CABLE 45028, [redacted] CIA, [CIA CABLE] 38405, May 17, 2003, p. 4-7. *See infra*, pp. 45-47.

[66] SSCI Study, Volume I, March 31, 2014, p. 20.

(U) *Inadequate Incorporation of Alternative Analysis Where Appropriate*

~~(TS~~[redacted]~~NF)~~ Analysts are generally encouraged to incorporate alternative analysis into their production where they can. Sometimes this exercise helps identify weaknesses in the analysis or highlights intelligence collection gaps. The Study is replete with uncited and potentially unknowable assertions like "there is no indication in CIA records that Abu Zubaydah provided information on bin al-Shibh's whereabouts"[67] or "[redacted] never visited the site."[68] Alternate analysis would certainly have been helpful in disproving the first claim and may have been helpful in the determination of whether the second assertion could really be established by records alone. With respect to the first claim, Abu Zubaydah did provide locational information about bin al-Shibh. As discussed below, Zubaydah made four separate photographic identifications of bin al-Shibh and placed him in Kandahar, Afghanistan, during the November to December 2001 timeframe and provided sufficient information for interrogators to conclude that bin al-Shibh was subsequently with KSM in Karachi, Pakistan.[69] With respect to the absolute claim that [redacted] never visited a particular site, alternative analysis may have demonstrated a need for additional information beyond that contained in the documentary record. That alternative analysis may have counseled in favor of modifying the assertion to something like, "It appears that no [redacted] visited the site during that timeframe" or dropping the assertion in its entirety.

(U) *Based on Flawed Logical Argumentation*

~~(TS~~[redacted]~~NF)~~ Proper tradecraft entails understanding of the information and reasoning underlying analytic judgments. Key points should be made effectively and supported by information and coherent reasoning. Substandard analysis presents unsupported assertions that appear contrary to the evidence cited or in violation of common sense. We found instances where claims were supported more by rhetorical devices than sound logical reasoning. For example, in support of the Study's conclusion that the CIA's use of enhanced interrogation techniques was not effective, the Study stated:

> At least seven detainees were subjected to the CIA's enhanced interrogation techniques almost immediately after being rendered into CIA custody, *making it impossible to determine* whether the information they provided could have been obtained through non-coercive debriefing methods."[70]

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[67] SSCI Study, Executive Summary, December 3, 2014, p. 317.

[68] SSCI Study, Volume I, March 31, 2014, p. 227.

[69] *See infra*, p. 38.

[70] SSCI Study, Findings and Conclusions, April 3, 2014, p. 2 (emphasis added). [[This false reasoning was tempered in the December 3, 2014, version of the Executive Summary by editing the sentence to read, "CIA detainees who were subjected to the CIA's enhanced interrogation techniques were usually subjected to the techniques immediately after being rendered to CIA custody. Other detainees provided significant accurate intelligence prior to, or without having been subjected to these techniques." *Compare* SSCI Study, Findings and Conclusions, April 3, 2014, p. 2 *with* SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.]]

This statement is a rhetorical attempt to persuade the reader that non-coercive techniques may have been equally or even more successful than the enhanced techniques. It is little more than an appeal to unknowable facts and is not based upon logical reasoning.[71]

~~(TS~~[redacted]~~NF)~~ We also found instances where the Study undermined its own claims by citing to documents that contradicted those claims. For example, while discussing testimony given by then CIA Director Hayden on the Program, the Study states, "Hayden's testimony included *the representation that Abu Zubaydah had a religious basis for cooperating* after the use of the CIA's enhanced interrogation techniques . . .Research Note: *CIA records do not support this representation related to Abu Zubaydah* . . . ."[72] The Study also asserted, "Abu Zubaydah explained that he informed trainees at the training camp that "'no brother' should be expected to hold out for an extended time," and that captured individuals will provide information in detention. For that reason, the captured individuals, he explained, should "expect that the organization will make adjustments to protect people and plans when someone with knowledge is captured."[73] However, in the same intelligence report cited for the above proposition, Abu Zubaydah revealed, that as his conditions in CIA detention worsened,

> [H]e became increasingly concerned for his long-term wellbeing. *He said that this process eventually became an 'unbearable weight' that Allah would no longer require him to carry. Under these conditions, Allah would have mercy and forgive him* ('As Jesus forgave Peter for denying him three times') *for revealing to the Americans what he knew about al Qa'ida and the brothers.*[74]

This one admission by Abu Zubaydah, unexplainably omitted from the Study, completely contradicts the flawed logic of the Study's claim that religion played no role in his cooperation with the Americans. The criticism of Director Hayden here is unwarranted.

(U) ERRONEOUS STUDY CONCLUSIONS

(U) We were only given 60 days to prepare our initial minority views in response to the more than 6, 000-page Study, which was approved by the Committee at the end of the 112th Congress. In those initial views, we successfully endeavored to describe the major fallacies and problematic findings that we had time to identify in the Study. Despite the fact that the CIA response and the summer staff meetings essentially validated our criticisms of the original Study, it appears that the updated version of the Study largely persists with many of its erroneous analytical and factual claims. We have used these past eleven weeks to update our own minority views and focus our attention on eight of the Study's most problematic conclusions.[75]

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[71] For a more detailed analysis of this unsupported claim, *see infra*, p. 22.

[72] SSCI Study, Volume I, March 31, 2014, p. 1130 (emphasis added).

[73] SSCI Study, Executive Summary, December 3, 2014, p. 469 (citing CIA, [redacted] 10496, February 16, 2003, p. 2).

[74] CIA, [redacted] 10496, February 16, 2003, p. 3 (emphasis added).

[75] We will address these eight conclusions in the following order: (1) Conclusion 1; (2) Conclusion 2; (3) Conclusion 6; (4) Conclusion 7; (5) Conclusion 8; (6) Conclusion 5; (7) Conclusion 9; and (8) Conclusion 10.

(U) Conclusion 1 (The CIA's use of enhanced interrogation techniques was not effective)

(U) The first of these updated conclusions asserts that the "CIA's use of enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees."[76] The Study attempts to validate this apparently absolute conclusion by relying upon a number of faulty premises.

(U) The first faulty premise is that "seven of the 39 CIA detainees known to have been subjected to the CIA's enhanced interrogation techniques produced no intelligence while in CIA custody."[77] This 18 percent "failure rate" statistic may encourage some readers to jump to the hasty judgment that enhanced interrogation techniques were not an effective means of acquiring intelligence, because they failed to produce intelligence from every detainee against whom they were used. Such a judgment seems unreasonable, given that, in most human endeavors, 100 percent success rates are pretty rare, especially in complex processes like the ones involved here. If the Study's statistic is true, then it is just as true that 32 of the 39 detainees subjected to enhanced interrogation techniques did produce some intelligence while in CIA custody. That is an "effectiveness" rate of 82 percent for obtaining intelligence from detainees who were subjected to enhanced interrogation techniques. While an 82 percent effectiveness rate in obtaining some information sounds pretty good, this claim suffers from the same analytical defect as the Study's 18 percent failure rate, in that it does not provide any real insight about the *qualitative* value of the intelligence information obtained. The true test of effectiveness is the value of *what* was obtained—not how much or how little was obtained.

(U) As long as we are considering quantitative assessments of whether detainee interrogations led to the creation of intelligence reports, it might be useful to look at the "failure" and "effectiveness" rates for those detainees who were not subjected to enhanced interrogation. Using some of the Study's own numbers, a total of 119 detainees were in the CIA's Detention and Interrogation Program. Of these detainees, the interrogations of 41 of them resulted in no disseminated intelligence reports.[78] If true, we can deduce that 80 detainees were not subjected to enhanced interrogation and that the interrogations of 34 of these same detainees resulted in no disseminated intelligence reports.[79] Turning to the failure rate first, 34 of 80 CIA detainees who were not subjected to enhanced interrogation techniques produced no intelligence while in CIA custody. That is a 42.5 percent failure rate, more than double the 18 percent failure rate for the detainees subjected to enhanced interrogation techniques. Conversely, 46 of 80 detainees who were not subjected to enhanced interrogation techniques produced some intelligence while in CIA custody. That is a 57.5 percent effectiveness rate, which is also considerably lower than the 82 percent effectiveness rate for the detainees subjected to enhanced interrogation.

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[76] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2. The first and second conclusions in the updated Findings and Conclusion had been combined in Conclusion 9 of the original Study.

[77] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2. The assertion of "produced no intelligence" as used by the Study reflects that the interrogations of these detainees resulted in no intelligence reports.

[78] *See* SSCI Study, Volume II, April 1, 2014, pp. 420-421.

[79] Subtracting the 39 detainees subjected to enhanced interrogation from 119 total detainees equals 80 detainees not subjected to enhanced interrogation. We know that seven of the detainees subjected to enhanced interrogation resulted in no intelligence reports. Subtracting these seven from the 41 total detainees whose interrogation did not result in disseminated intelligence reports leaves 34 detainees whose information did not result in disseminated intelligence products, even though they were not subjected to enhanced interrogation.

(U) Unlike the above measures, there are some quantitative statistics in the Study that are useful in comparing the relative "productivity" of certain detainees. The Study estimates that a total of 5,874 sole source disseminated intelligence reports were produced from the interrogation of 78 of the 119 detainees. Of these, 4266 reports (72.6 percent) were produced from the interrogation of 32 of the 39 detainees subjected to enhanced interrogation.[80] Thus, 1608 reports (27.4 percent) were produced from the interrogation of 46 of the 90 detainees not subjected to enhanced interrogation.[81] The Study also credits Abu Zubaydah and KSM with 1597 (27.1 percent) of the total number of disseminated reports.[82] While these statistics cannot be used to assess the qualitative value of the specific intelligence in these disseminated reports, they do seem to provide insight into the CIA's perceived value of the information being produced by the detainees who were subjected to enhanced interrogation, especially Abu Zubaydah and KSM. Given that the vast majority of these intelligence reports came from detainees selected for enhanced interrogations, these statistics seem to indicate that the CIA was proficient at identifying those detainees who might possess information worthy of dissemination.

(U) The second faulty premise states:

> At least seven detainees were subjected to the CIA's enhanced interrogation techniques almost immediately after being rendered to CIA custody, *making it impossible to determine* whether the information they provided could have been obtained through non-coercive debriefing methods. By contrast, other detainees provided significant accurate intelligence prior to, or without having been, subjected to these techniques.[83]

(U) This premise is problematic for at least two reasons. First, the premise itself admits that it is based upon ignorance—we will never know whether less coercive techniques would have provided the same amount of intelligence from these seven detainees as was obtained by using enhanced interrogation. It is troubling that the very first conclusion in this Study is based, at least in part, upon an appeal to unknowable facts. Second, this appeal to ignorance is linked to an observation that other detainees provided "significant accurate intelligence" without having been subjected to enhanced interrogation, in an apparent effort to persuade us that the use of less coercive techniques might have also resulted in "significant accurate intelligence." While this second observation is factually correct, it is misleading. We know from our earlier examination of the "productivity" statistics that the group of detainees who were not subjected to enhanced interrogation only provided 27.4 percent of the disseminated intelligence reporting, which undercuts the very inference raised by this empty premise.

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[80] *See* SSCI Study, Volume II, April 1, 2014, p. 421.

[81] Subtracting the 4,266 reports produced from the interrogation of detainees subjected to enhanced interrogation from the 5,874 total number of reports equals 1,608 reports (27.4 percent) produced from the interrogation of detainees not subjected to enhanced interrogation.

[82] *See* SSCI Study, Volume II, April 1, 2014, p. 421.

[83] SSCI Study, Findings and Conclusions, April 3, 2014, p. 2 (emphasis added). [[This false reasoning was tempered in the December 3, 2014, version of the Executive Summary by editing the sentence to read, "CIA detainees who were subjected to the CIA's enhanced interrogation techniques were usually subjected to the techniques immediately after being rendered to CIA custody. Other detainees provided significant accurate intelligence prior to, or without having been subjected to these techniques." *Compare* SSCI Study, Findings and Conclusions, April 3, 2014, p. 2 *with* SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.]]

(U) The third faulty premise of this ineffective means conclusion focuses on the fact that "multiple" detainees subjected to enhanced interrogation techniques "fabricated information, resulting in faulty intelligence."[84] Like the first faulty premise, this premise only tells one side of the story. It implies that only detainees subjected to enhanced interrogation provided fabricated information. Not surprisingly, our review of the documentary record revealed that "multiple" detainees whose non-enhanced interrogations resulted in at least one sole source intelligence report also provided fabricated information to their interrogators.[85] Fabrication is simply not a good measure of "effectiveness," because detainees are often strongly motivated to protect the identities of their terrorist colleagues and the details of their terrorist operations. We train our own military personnel to resist against providing sensitive information to their captors during the inevitable interrogation process. We understand that such resistance may occasionally lead our personnel to provide fabricated information to their interrogators. This is an ancient and well-recognized occupational hazard of war.

(U) Another problematic aspect of this third faulty premise is that it ignores the fact that fabricated information can sometimes turn out to be highly significant. One of the best examples of this concept can be found in our discussion about how the courier who led us to Bin Ladin's hideout was finally located.[86] Specifically, many of the senior al-Qa'ida detainees lied to protect the identity and importance of Abu Ahmad al-Kuwaiti. Abu Zubaydah and Abu Faraj al-Libi both lied when they claimed that they did not know anyone named Abu Ahmad al-Kuwaiti. KSM fabricated a story that Ahmad had retired from al-Qa'ida. When compared against other detainee information, these fabrications were clear signals to CIA analysts that these three detainees were trying very hard to keep Ahmad hidden.[87]

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[84] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.

[85] Our review examined the first 15 of the 46 detainees whose non-coercive interrogations had resulted in at least one sole-source intelligence report. *See* SSCI Study, Executive Summary, December 3, 2014, p. 462. We found documentary evidence supporting the proposition that 11 of these 15 detainees provided deceptive or fabricated information to their interrogators. The 11 deceptive detainees were: Zakariya (CIA, [CIA CABLE] 22576, [redacted]; CIA, CIA CABLE [redacted] [redacted] CIA, CIA CABLE [redacted] [redacted] Jamal Eldin Boudraa, (CIA, [CIA CABLE] 22576, [redacted] CIA [CIA CABLE] 21520, [redacted] Bashir Nasir Ali al-Marwalah (CIA, [CIA CABLE] 27298[redacted] CIA, CIA CABLE 13756, [redacted] Ha'il Aziz Ahmad al-Mithali (CIA, CIA CABLE 13756[redacted] Musab Umar Ail al-Mudwani (CIA, CIA CABLE 13756[redacted] Shawqi Awad (CIA, CIA CABLE 15643[redacted] Umar Faruq, aka Abu al-Faruq al-Kuwaiti (CIA, CIA CABLE [redacted] CIA, CIA CABLE 12313[redacted] CIA, [CIA CABLE] 28108[redacted] [DETAINEE R] (CIA, CIA CABLE [redacted] Abd al-Rahim Ghulam Rabbani (CIA, CIA CABLE [redacted]; and Haji Ghalgi (CIA, CIA CABLE 191458,[redacted] We were unable to find documentary evidence supporting any deception or fabrication by the following four detainees: Abbar al-Hawari, aka Abu Sufiyan; Hassan bin Attash; Said Saleh Said, aka Said Salih Said; and Hayatullah Haqqani.

[86] *See infra*, pp. 73-76.

[87] See CIA, DIRECTOR [redacted] CIA Center for the Study of Intelligence, *Lessons from the Hunt for Usama Bin Ladin*, dated September 2012, pp. 9-10 (DTS 2012-3826); CIA Intelligence Assessment, *Al-Qa'ida Watch, Probable Identification of Suspected Bin Ladin Facilitator Abu Ahmad al-Kuwaiti*, November 23, 2007, p. 2.

[87] *See* SSCI Study, Executive Summary, December 3, 2014, p. 378-379.

(U) The final faulty premise used in support of this "effectiveness" conclusion was that "CIA officers regularly called into question whether the CIA's enhanced interrogation techniques were effective, assessing that the use of the techniques failed to elicit detainee cooperation or produce accurate intelligence."[88] While the *opinions* of these unidentified CIA officers may happen to coincide with the Study's first conclusion, there were at least three other CIA officials who held the opposite view—Directors Tenet, Goss, and Hayden. DCI Tenet stated that he "firmly believes that the interrogation program, and specifically the use of EITs, has saved many lives." Tenet added that the use of the CIA's enhanced interrogation techniques was "extremely valuable" in obtaining "enormous amounts of critical threat information," and he did not believe that the information could have been gained any other way.[89] Director Goss told our Committee members that

> This program has brought us incredible information. It's a program that could continue to bring us incredible information. It's a program that could continue to operate in a very professional way. It's a program that I think if you saw how it's operated you would agree that you would be proud that it's done right and well, with proper safeguards."[90]

CIA Director Hayden also told our Committee that the CIA's interrogation Program existed "for one purpose–intelligence," and that the Program "is about preventing future attacks. . . . In that purpose, preventing attacks, disabling al-Qa'ida, this is the most successful program being conducted by American intelligence today."[91]

(U) In our opinion, the reasons cited by the Study to support this conclusion that the CIA's use of enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees are largely invalid. The faulty premises upon which the conclusion is based are more rhetorical than analytical. Our review of the facts contained in the documentary record has led us to the opposite conclusion—that the CIA's Detention and Interrogation Program, including the use of enhanced interrogation, was an effective means of gathering significant intelligence information and cooperation from a majority of these CIA detainees. Our conclusion, however, should not be read as an endorsement of any of these particular enhanced interrogation techniques.

(U) Conclusion 2 (CIA's Justification for EITs Rested on Inaccurate Effectiveness Claims)

(U) Conclusion 2 states, "[t]he CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness."[92] The Study continues to rely upon 20 separate case studies to support this erroneous conclusion. In our original minority views, we only had time to identify the significant flaws in seven of these case studies. Prior to our receipt of the June 27, 2013, CIA response, we identified significant problems with four more of the case studies. Ultimately, the CIA response validated our critique of the original seven case studies and identified additional issues with the remaining case studies. We have decided to address 17 of these case studies in our examination of this conclusion.[93] Although one may have individual views on the relative effectiveness of the enhanced interrogation techniques; it is important for the public to understand that these flawed case studies are insufficient to establish that the CIA's justification for the use of enhanced interrogation techniques rested upon inaccurate claims of their effectiveness.

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[88] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.

[89] Interview of George Tenet, by [REDACTED], [REDACTED], Office of the Inspector General, 8 September, 2003.

[90] SSCI Transcript, *Briefing by the Director of the Central Intelligence Agency Regarding CIA's Counterterrorism Operations and Detention, Interrogation, and Rendition Program*, March 15, 2006, p. 8 (DTS 2006-1308).

[91] SSCI Transcript, *Hearing on the Central Intelligence Agency Detention and Interrogation Program,* April 12, 2007, pp. 16-17 (DTS 2007-3158).

[92] SSCI Study, Findings and Conclusions, December 3, 2014, p. 2.

(U) *The Study's Flawed Analytical Methodology*

(U) In general, the Study essentially refuses to admit that CIA detainees, especially CIA detainees subjected to enhanced interrogation techniques, provided intelligence information which helped the United States government and its allies neutralize numerous terrorist threats. On its face, this position does not make much sense, given the vast amount of information gained from these interrogations, the thousands of intelligence reports that were generated as a result of them, the capture of additional terrorists, and the disruption of the plots those captured terrorists were planning.

(U) We reviewed 17 of the 20 cases studies that the Study relies upon to support this flawed conclusion. We examined these case studies in logical groupings (e.g., related to information provided by Abu Zubaydah) using chronological order rather than the Study's confusing "primary" and "secondary" effectiveness representations. This approach helped us better understand how the intelligence resulting from these detainee interrogations was used by the CIA to disrupt terrorist plots and identify, capture, and sometimes prosecute other terrorists.

(U) The Study developed an analytical methodology to examine the effectiveness of the information obtained from the CIA's Detention and Interrogation Program that we found to be both confusing and deeply flawed. Usually, effectiveness is measured by establishing performance metrics that require the collection of pertinent data and the subsequent analysis of such data. For example, in the context of counterterrorism such metrics might include: (1) increased understanding of terrorist networks; (2) identification of terrorists and those providing material support; (3) terrorist captures; (4) terrorist interrogations; (5) disruption of terrorist operations and financing; (6) disruption of terrorist recruitment; (7) reduction in terrorist safe-havens; (8) development of counterterrorism assets; (9) intelligence gathering of documents, computer equipment, communications devices, etc.; (10) improved information sharing; and (11) improved foreign liaison cooperation against terrorism. Such metrics could then be compared against the information provided by CIA detainees to assess the relative effectiveness of the Program.

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[93] We have combined the KSM as the "mastermind" of the September 11, 2001, terrorist attacks case study with the KSM "Mukhtar" alias case study. We did not have time to adequately address the Majid Khan, Sajid Badat, and Dhiren Barot case studies.

(U) Instead of performance metrics, the Study's analytical methodology creates artificial categories that are used to *exclude* certain detainee information from being considered in an effectiveness assessment of the Program. For example, if the Study found that a detainee subjected to enhanced interrogation had provided similar information during an earlier non-enhanced interrogation, then such information could not be used for assessing the effectiveness of the program. This category appears to have been developed in an attempt to exclude much of the intelligence information provided by Abu Zubaydah after he was subjected to enhanced interrogation in August 2002, since some of the information Abu Zubaydah provided during those interrogations was similar to information he had provided prior to August. However, it turns out that this category is largely inapplicable to Abu Zubaydah's case, because he was subjected to enhanced interrogation by the CIA when he was released from the hospital on April 15, 2002.[94]

(U) Another category of information that the Study's flawed analytical methodology excludes is corroborative information. If a detainee subjected to enhanced interrogation provided information that was already available to the CIA or other elements of the Intelligence Community from another source, then the methodology dictates that such information cannot be considered to support a CIA effectiveness representation. This result occurs even in situations in which the detainee's information clarified or explained the significance of the prior information. Another exclusion category applies if the Study determined that there was no causal relationship between the information obtained from a detainee after the use of enhanced interrogation and the operational success claimed by the CIA. In these case studies, we often found documentary evidence that supported direct causal links between such detainee information and the operational success represented by the CIA. The final category excludes detainee information about terrorist plots when there was a subsequent assessment by intelligence and law enforcement personnel that such plots were infeasible or never operationalized.

(U) This flawed analytical methodology often forced the Study to use absolute language such as, "no connection," "no indication," "played no role," or "these representations were inaccurate." Our review of the documentary record often found valid counter-examples that disproved such absolute claims. We also found that when we invalidated the claims in the initial case studies, there was often a cascading effect that further undermined claims in the subsequent case studies. Here we summarize the claims for the case studies we examined and our alternate analysis of those claims.

(U) *Our Analytical Methodology*

(U) Our analytical methodology simply focuses on the significant inherent weaknesses contained in the analytical categories of the Study's methodology. For example, in case studies where the Study claims there was no relationship between the use of enhanced interrogation techniques and the operational success, it often uses absolute language such as, "no connection," "no indication," "played no role," or "these representations were inaccurate." This greatly simplified our analytical task, because the main problem with absolute claims is that it usually only takes one valid counter-example to disprove the claim. We did not have too much difficulty using the documentary record to: establish connections; find indications; identify the roles; and demonstrate the accuracy of certain representations. We suspect that this task would have been even easier if there had been an opportunity to speak to the relevant witnesses.

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[94] *See infra*, pp. 33-36.

(U) The same can be said with respect to the Study's treatment of the "otherwise available categories." In these case study claims, the Study would point to documents that "provided similar information" or contained "corroborative" information. The usual problem with these claims is that they failed to analyze the weight and significance of the information provided by the particular detainee. We found documentary evidence indicating that the CIA often had not understood or properly exploited previously acquired intelligence information until after its significance was clarified by a particular detainee or detainees.

(U) Also, we were less inclined to dismiss the significance of certain plots and threats just because there was documentary evidence indicating that some intelligence professionals found them infeasible or had not yet become operational. Often, the most difficult part of a terrorist plot is getting the terrorists into a position where they can attack. If the terrorists are not neutralized, they have additional time to refine their plans, adjust to new targets, or gain access to better weapons and equipment. The evolving nature of the Karachi terrorist plots demonstrates this point quite well.[95]

(U) *Re-organization of the "Effectiveness" Case Studies*

(U) In general, we have tried to organize our analysis of these case studies sequentially into six logical and chronological groupings. For example, since Abu Zubaydah was the first CIA detainee subjected to enhanced interrogation techniques, we begin with the case studies which examine the significant intelligence information that he disclosed to his interrogators. Despite claims made by the Study, we found that, over time, information obtained from Abu Zubaydah was very useful in the subsequent interrogation of other detainees and sometimes even helped lead to the capture of other terrorists, which in turn, often disrupted developing terrorist plots.

(U) The next logical grouping of case studies centers geographically in Pakistan during the March 2002 through April 2003 time-frame and concerns the Intelligence Community's efforts to locate and capture the al-Qa'ida terrorists in that country. For example, we trace how Abu Zubaydah's information helped [redacted] Pakistani authorities conduct important raids on several key safe houses in Karachi on September 10-11, 2002, which resulted in a treasure trove of collected physical evidence and intelligence information, as well as the capture of Ramzi bin al-Shibh, Abu Badr, Abdul Rahim Gulam Rabbani, Hassan Muhammad, Ali bin Attash, and other al-Qa'ida members. We turn next to the capture of KSM in Rawalpindi in March 2003 and then examine the various Karachi terrorist plots, which were largely neutralized by the September 2002 safe house raids, but were not finally disrupted until the capture of Ali Abdul Aziz Ali and Khallad bin Attash on April 29, 2003, in Karachi. This grouping ends with our discussion of the Heathrow and Canary Wharf Plots, which were fully disrupted with the captures of Ramzi bin al-Shibh, KSM, Ali Abdul Aziz Ali, and Khallad bin Attash.

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[95] *See infra*, pp. 45-47.

(U) The third grouping takes us briefly to Southeast Asia and our analysis of how detainee information helped lead to the capture of Riduan Isamuddin, also known as "Hambali" in Thailand during August 2003, the disruption of the Second Wave plots, and the capture of his Al-Ghuraba Group in Karachi, Pakistan.

(U) Our fourth grouping consists of the case studies that primarily involved information provided by KSM. We begin with an analysis of four case studies where KSM provided helpful information during 2003: the critical intelligence on Jaffar al-Tayyar (also known as Adnan el-Shukrijumah); the arrest of Saleh al-Marri; the capture of Iyman Faris; and the identification and arrests of Uzhair and Saifullah Paracha.

(U) The fifth grouping examines three case studies that are factually unrelated but depend upon detainee information that was provided in 2004. The first involves the tactical intelligence provided on Shkai, Pakistan, by Hassan Ghul. The second involves the thwarting of the Camp Lemonier plotting in Djibouti and the third examines how CIA detainees subjected to enhanced interrogation provided information useful in the validation of CIA sources.

(U) Our final chronological group covers the identification of Usama Bin Ladin's courier. Here, we demonstrate that detainee information played a significant role in leading CIA analysts to the courier Abu Ahmad al-Kuwaiti, who in turn, led the Intelligence Community to Usama Bin Ladin.

(U) *The Domino Effect*

(U) Our reorganization of these case studies away from the Study's confusing primary and secondary "effectiveness representations" frame of reference into a more traditional chronological analytical framework clearly exposes the fatal flaw in the structure of the Study's current analysis. In essence, the Study's analysis resembles a very large and carefully lined-up set of dominoes. The claims made in those first few dominoes are absolutely crucial in maintaining the structure and validity of many of the claims made and repeated in the dominoes that follow. Our analysis demonstrates that the claims in these initial case studies are simply not supported by the factual documentary record. This led to an analytical chain reaction in which many of the Study's subsequent claims became invalid, in part, because of their dependence on the first few factually inaccurate claims.

~~(TS~~[redacted]~~NF)~~ A good example of this "Domino Effect" is the factually incorrect claim made by the Study that the use of enhanced interrogation techniques played "no role" in the identification of Jose Padilla, because Abu Zubaydah provided the information about Padilla during an interrogation by FBI agents who were "exclusively" using "rapport-building" techniques against him more than three months prior to the CIA's "use of DOJ-approved enhanced interrogation techniques."[96] The facts demonstrate, however, that Abu Zubaydah had been subjected to "around the clock" interrogation that included more than four days of dietary manipulation, nudity, as well as a total of 126.5 hours (5.27 days) of sleep deprivation during the 136-hour (5.67 day) period by the time the FBI finished up the 8.5-hour interrogation shift which yielded the identification of Jose Padilla.[97] Since these three enhanced interrogation techniques were used in combination with the FBI's "rapport building" technique during this particular interrogation, it is simply absurd to claim that they played "no role" in obtaining the information about Padilla from Abu Zubaydah. Consistent with the "Domino Effect" analogy, when this factually incorrect claim falls, it can no longer be cited as support for other claims. This specific factually incorrect claim, sometimes used in slightly different variations, is repeated at least 19 times throughout the Study.[98]

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[96] SSCI Study, Executive Summary, December 3, 2014, pp. 230-231 and 230 n.1315; *see infra*, pp.33-36.

(U) Ultimately, our analysis of these case studies leads us to conclude that there are simply not enough "dominoes" left standing to support the Study's explosive conclusion—that the "CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness." It is very disappointing that the Study has leveled such serious accusations against the personnel involved in the CIA's Detention and Interrogation Program, when so many of the Study's own claims are demonstrably false.

(U) *The Identification of Khalid Shaykh Mohammad as the Mastermind of the 9/11 Attacks and His "Mukhtar" Alias*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"On at least two prominent occasions, the CIA represented, inaccurately, that Abu Zubaydah provided [information identifying KSM as the mastermind of 9/11] after the use of the CIA's enhanced interrogation techniques."[99]**

~~(TS~~[redacted]~~NF)~~ **"In at least one instance in November 2007 . . . the CIA asserted that Abu Zubaydah identified KSM as 'Mukhtar' after the use of the CIA's enhanced interrogation techniques."[100]**

~~(TS~~[redacted]~~NF)~~ **"There is no evidence to support the statement that Abu Zubaydah's information—obtained by FBI interrogators prior to the use of the CIA's enhanced interrogation techniques and while Abu Zubaydah was hospitalized—was uniquely important in the identification of KSM as the 'mastermind' of the 9/11 attacks."[101]**

Fact: **(U) Neither of the occasions cited with respect to the "Mastermind of 9/11" information were "prominent." The first occasion was not even a CIA representation, but rather a mistake made by the Department of Justice in one of its legal opinions.[102] The second occasion was a set of November 2007 documents and talking points for the CIA Director to use in a briefing with**

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[97] *See infra*, pp. 33-36.

[98] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 209-210, 230, 230 n.1314, 234; SSCI Study, Volume I, March 31, 2014, pp. 624 and 636; and SSCI Study, Volume II, April 1, 2014, pp. 57, 75, 75 n.274, 79, 343, 349, 358, 409, 445 n.2245, 530, 532, 535, and 1089.

[99] SSCI Study, Executive Summary, December 3, 2014, p. 312.

[100] SSCI Study, Executive Summary, December 3, 2014, p. 315.

[101] SSCI Study, Executive Summary, December 3, 2014, p. 313.

[102] *See* SSCI Study, Executive Summary, December 3, 2014, p. 313, n.1748.

the President. Although these briefing materials did contain some erroneous information about KSM's interrogation, the Study fails to demonstrate whether this erroneous information was "represented" to the President during that timeframe.[103]

(U) The one instance where the CIA asserted that Abu Zubaydah identified KSM as "Mukhtar" after the use of enhanced interrogation techniques was contained in the same November 2007 briefing materials used by the CIA Director to brief the President.[104] Again, the Study fails to demonstrate whether this erroneous information was "represented" to the President during this timeframe.

(U) There is considerable evidence that the information Abu Zubaydah provided identifying KSM as "Mukhtar" and the mastermind of 9/11 was significant to CIA analysts, operators, and FBI interrogators. Both the Congressional Joint Inquiry into the 9/11 Attacks and the 9/11 Commission discussed the importance of this information to the Intelligence Community in understanding KSM's role in the attacks and in the al-Qa'ida organization.

(U) We have combined our analysis of these two case studies because they share common facts and analytical issues. The Study's claims with respect to the CIA's alleged misrepresentations about KSM's "Mukhtar" alias and being the mastermind of 9/11 are themselves inaccurate. Also, the Study's absolute claim that "there is no evidence" that Abu Zubaydah's information was uniquely important in the identification of KSM as the mastermind of 9/11is contradicted by the documentary record and publicly available information.

(U) Our analysis of the Study's erroneous claims about the supposed CIA "representations" is dispositive. For the first "prominent" occasion, the Study mistakenly alleges that the CIA made an inaccurate representation about Abu Zubaydah providing information identifying KSM as the mastermind of 9/11 after the use of the CIA's enhanced interrogation techniques.[105] It turns out that this particular inaccurate representation *was not made by the CIA*, but rather was expressed in a written legal opinion by the Office of Legal Counsel at the Department Justice (DOJ).[106] The Study confirms its own mistake by pointing out that the CIA briefing notes provided to DOJ in support of their request for the OLC opinion *correctly stated*, "Within months of his arrest, Abu Zubaydah provided details about al-Qa'ida's organization structure, key operatives, and modus operandi. It was also Abu Zubaydah, *early in his detention*,

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[103] *See* DCIA Talking Points: Waterboard, 06 November 2007, pp. 1-3. This document was sent to DCIA on November 6 in preparation for a meeting with POTUS.

[104] *See* DCIA Talking Points: Waterboard, November 6, 2007, pp. 1-3.

[105] *See* SSCI Study, Executive Summary, December 3, 2014, p. 312-313.

[106] *See* Memorandum for John A. Rizzo from Steven Bradbury, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, May 30, 2005, p. 10.

who identified KSM as the mastermind of 9/11."[107] DOJ is accountable for this negligible mistake, not the CIA.

~~(S//OC/NF)~~ With respect to the second "prominent" occasion, the CIA does admit that "in one instance—a supporting document for a set of DCIA talking points for a meeting with the President—we mischaracterized the information as having been obtained after the application of enhanced interrogation techniques."[108] However, while this information in Director Hayden's briefing materials about KSM was inaccurate, the Study fails to explain how the CIA supposedly "represented" these inaccuracies to the President or other executive branch officials during this November 2007 timeframe. Without talking to witnesses, we have no proof that any such inaccurate representation ever occurred. What we do know is that President Bush got this issue right in a speech that he delivered nearly a year before this particular error was inserted into Director Hayden's briefing materials. Specifically, President Bush said,

> After he recovered, Zubaydah was defiant and evasive. He declared his hatred of America. During questioning, he at first disclosed what he thought was nominal information—and then stopped all cooperation. Well, in fact the 'nominal' information he gave us turned out to be quite important. For example, Zubaydah disclosed Khalid Sheikh Mohammed—or KSM—was the mastermind behind the 9/11 attacks, and used the alias 'Muktar.'[109]

The President's speech is the "representation" that mattered most, regardless of whether the erroneous information in Director Hayden's briefing materials was discussed during a classified Presidential briefing one year later. We conclude that if there was any error here, it was harmless.

~~(S//OC/NF)~~ The Study's claim in the second case study is essentially identical to the first, except that Director Hayden's briefing materials for the November 2007 meeting with the President contained an erroneous assertion that Abu Zubaydah identified KSM as "Mukhtar" after the use of the CIA's enhanced interrogation techniques.[110] Analytically, this is a distinction without a difference and we reach the same conclusion—if there was any error here, it was harmless.

~~(S//~~[redacted]~~//NF)~~ Turning now to the Study's "no evidence" claim, numerous Intelligence Community documents show that Intelligence Community analysts believed that Zubaydah's information identifying KSM as the mastermind of 9/11 was important. Soon after the interrogation that revealed KSM as the mastermind of 9/11 and identification as "Mukhtar," the CIA disseminated an intelligence report, [redacted] within the Intelligence Community [redacted]

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[107] Briefing Notes on the Value of Detainee Reporting, April 8, 2005, p. 5. (emphasis added)

[108] CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 20.

[109] President George W. Bush, *Trying Detainees; Address on the Creation of Military Commissions,* Washington, D.C., September 6, 2006.

[110] *See* SSCI Study, Executive Summary, December 3, 2014, p. 315.

[redacted] detailing the information.[111] Responses [redacted] indicated they followed up and requested more information [redacted] on him.[112]

~~(S//NF)~~ Zubaydah's FBI interrogator Ali Soufan also described the information from Zubaydah on KSM as significant. In 2008, Soufan told Committee staff that when Zubaydah provided that information, "we had no idea at the time that Mukhtar was the KSM from 9/11. . . . Because we had been working so diligently on trying to figure out the puzzles of 9/11 and who is Mukhtar, and when Abu Zubaydah said that, I think the picture was complete."[113] On May 13, 2009, Soufan also told the Senate Judiciary Committee that prior to Zubaydah providing information on KSM's role as the mastermind of the 9/11 attacks, "we had no idea of KSM's role in 9/11 or of his importance in the al Qaeda leadership structure."[114]

(U) Moreover, a summary of the Program released publicly by the Director of National Intelligence in 2006 explained both the significance of this information and how other previously collected intelligence had not stood out to analysts until the information from Zubaydah. According to the summary, "during initial interrogation, Abu Zubaydah gave some information that he probably viewed as nominal. Some was important, however, including that KSM was the 9/11 mastermind and used the moniker "Mukhtar." This identification allowed us to comb previously collected intelligence for both names, opening up new leads to this terrorist plotter—leads that eventually resulted in his capture."[115]

~~(TS~~[redacted]~~NF)~~ The Senate and House Intelligence Joint Inquiry Into the Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, adopted with the support of four members who also voted in favor of the Study, said that "although the Intelligence Community knew of KSM's support for terrorism since 1995 and later learned of his links to al-Qa'ida, he was not recognized as a senior al-Qa'ida lieutenant. In April 2002, the Intelligence Community learned that KSM and his group conceived the September 11 plot."[116] If there is any doubt that the report was referring to the information from Zubaydah, CIA operational cable traffic from April 2002 confirms: "[Abu Zubaydah] stated the idea of September 11 was conceived by [KSM] and his group."[117]

(U) The 9/11 Commission Report also made clear that the Intelligence Community did not recognize KSM's importance prior to 9/11. "KSM, who had been indicted in January 1996 for his role in the Manila air plot, was seen primarily as another freelance terrorist, associated with Ramzi Yousef."[118] The Commission noted that because KSM was being targeted for arrest, responsibility for tracking him was in CIA's Renditions Branch, which did not focus on analytic connections. "When subsequent information came, more critical for analysis than for tracking, no unit had the job of following up on what the information might mean."[119] As one of ten "Operational Opportunities" that were missed prior to 9/11, the Commission wrote, "August 2001, the CIA does not focus on information that Khalid Sheikh Mohammed is a key al Qaeda lieutenant or connect information identifying KSM as the 'Mukhtar' mentioned in other reports to the analysis that could have linked 'Mukhtar' with Ramzi Binalshibh and Moussaoui."[120] The 9/11 Commission adds:

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[111] *See* CIA, [redacted]
[112] *See* CIA, [redacted]
[113] SSCI Transcript, *Staff Interview of FBI Special Agent Ali Soufan*, April 28, 2008 (DTS 2008-2411).
[114] Ali Soufan, Statement for the Record, before the United States Senate Committee on the Judiciary, May 13, 2009.
[115] Summary of the High Value Terrorist Detainee Program, Office of the Director of National Intelligence, p. 1.
[116] The Joint Inquiry Into the Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, December 2002, p. 310.
[117] CIA, [redacted] 10065, April 18, 2002, p. 3.
[118] 9/11 Commission Report, p. 276.

> The final piece of the puzzle arrived at the CIA's Bin Ladin unit on August 28 [2001] in a cable reporting that KSM's nickname was Mukhtar. No one made the connection to the reports about Mukhtar that had been circulated in the spring. This connection might have also underscored concern about the June reporting that KSM was recruiting terrorists to travel, including to the United States. Only after 9/11 would it be discovered that Mukhtar/KSM had communicated with a phone that was used by Binalshibh, and that Binalshibh used the same phone to communicate with Moussaoui.[121]

(U) Finally, the 9/11 Commission notes that the information connecting KSM to the Binalshibh phone came from detainee interviews with Binalshibh in late 2002 and 2003 and with KSM in 2003, well after Abu Zubaydah identified KSM as Mukhtar and the 9/11 mastermind.[122] It is also worth noting that, like this information, all of the information for chapters 5 and 7 of the 9/11 Commission report, which explain what the Commission knew about al-Qa'ida's planning for the 9/11 attacks, "rel[ies] heavily on information obtained from captured al Qaeda members," mostly in CIA's interrogation program.[123]

(U) *The Thwarting of the Dirty Bomb/Tall Buildings Plot and the Capture of Jose Padilla*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"A review of CIA operational cables and other CIA records found that the use of the CIA's enhanced interrogation techniques played no role in the identification of 'Jose Padilla' or the thwarting of the Dirty Bomb or Tall Buildings plotting. CIA records indicate that: . . . (3) Abu Zubaydah provided this information to FBI officers who were using rapport-building techniques, in April 2002, more than three months prior to the CIA's 'use of DOJ-approved enhanced interrogation techniques,' . . . ."[124]**

Fact: ~~(TS~~[redacted]~~NF)~~ **CIA records clearly indicate that sleep deprivation played a significant role in Abu Zubaydah's identification of Jose Padilla as an al-Qa'ida operative tasked to carry out an attack against**

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[119] 9/11 Commission Report, p. 276.
[120] 9/11 Commission Report, p. 356.
[121] 9/11 Commission Report, p. 277. The CIA acknowledged that this intelligence report identified KSM as "Mukhtar" prior to Abu Zubaydah's information. After reviewing its records, the CIA concluded that "our officers simply missed the earlier cable." CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 22.
[122] 9/11 Commission Report, Chapter 7, n.163.
[123] 9/11 Commission Report, p. 146.
[124] SSCI Study, Executive Summary, December 3, 2014, pp. 229-231.

the United States. Abu Zubaydah provided this information to FBI agents during an interrogation session that began late at night on April 20, 2002, and ended on April 21, 2002. Between April 15, 2002 and April 21, 2002, Abu Zubaydah was deprived of sleep for a total of 126.5 hours (5.27 days) over a 136 hour (5.6 day) period—while only being permitted several brief sleep breaks between April 19, 2002 and April 21, 2002, which totaled 9.5 hours.

~~(TS~~[redacted]~~NF)~~ This particular Study claim gives the false impression that enhanced interrogation techniques played no role in obtaining important threat information about Jose Padilla during the interrogation of Abu Zubaydah on April 20-21, 2002, and implies that such information was really just the result of the "rapport-building" techniques used by the FBI agents that evening.

~~(TS~~[redacted]~~NF)~~ The CIA documentary record is clear that Abu Zubaydah was subjected to an extended period of sleep deprivation and other enhanced interrogation techniques during his interrogation between April 15, 2002 and April 21, 2002.[125] Specifically, during this time period when FBI agents and CIA officers were working together in rotating, round-the-clock shifts, some of the interrogation techniques used on Abu Zubaydah included nudity,[126] liquid diet,[127] sensory deprivation,[128] and extended sleep deprivation.[129]

~~(TS~~[redacted]~~NF)~~ The sleep deprivation of Abu Zubaydah began on April 15, 2002.[130] By April 19, 2002, Abu Zubaydah had been subjected to 76 straight hours of sleep deprivation in the form of intensive interrogation sessions and his ability to focus on questions and provide coherent answers appeared to be compromised to a point where sleep was required.[131] Abu Zubaydah was allowed three hours of sleep at that time.[132] On April 20, 2002, the FBI began its late-night interrogation shift at approximately 10:30 p.m. with Abu Zubaydah and continued until about 7:00 a.m. the next morning. During that shift, Abu Zubaydah was given a two-hour sleep break; time for prayer, food, and water; and a medical check-up.[133] By April 21, 2002, the day he identified Jose Padilla as a terrorist inside the United States, CIA records indicate that Abu Zubaydah had only been permitted several brief sleep breaks between April 19, 2002 and April 21, 2002, which only totaled 9.5 hours of sleep over a 136-hour period.[134] *That means Abu Zubaydah had been sleep deprived for a total of 126.5 hours (5.27 days) over a 136-hour (5.6 day) period by the time his FBI interrogators were finished with him at the end of that shift.*

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[125] *See* CIA, [redacted] 10043, April 15, 2002, p. 2; CIA, [redacted] 10047, April 16, 2002, p. 2.

[126] SSCI Transcript, *Staff Interview of FBI Special Agent Ali Soufan*, April 28, 2008, p. 22. (DTS 2008-2411).

[127] *See* CIA, [redacted] 10090, April 21, 2002, p. 5.

[128] *See* CIA, [redacted] 10116, April 25, 2002, pp. 3-4; CIA, [redacted] 10016, April 12, 2002, pp. 4-5.

[129] *See* CIA, [redacted] 10094, April 21, 2002, p. 3; CIA, [redacted] 10071, April 19, 2002, p. 2; CIA, [redacted] 10091, April 21, 2002, p. 2. Dietary manipulation, nudity, and sleep deprivation (more than 48 hours) were also subsequently authorized as enhanced interrogation techniques by the Department of Justice. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, May 30, 2005, *Re: Application of United States Obligations under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High value Al Qaeda Detainees* (DTS 2009-1810, Tab-11).

[130] *See* FBI Letter to Pasquale J. (Pat) D'Amuro, Assistant Director, Counterterrorism Division, April 16, 2002, p. 2 ("The interview with ABU ZUBAYDA is continuing around the clock and we will advise you of any further information ASAP").

[131] *See* CIA, [redacted] 10071, April 19, 2002, p. 2.

[132] *See* CIA, [redacted] 10071, April 19, 2002, p. 2.

[133] *See* FBI Draft Report on Abu Zubaida interview session from approximately 10:30 p.m., April 20, 2002, to about 7:00 a.m., on April 21, 2002, p. 1.

~~(TS~~[redacted]~~NF)~~ A CIA chart, not included in the Study, which describes both the standard and enhanced techniques used on Abu Zubaydah, notes for April 21, 2002, "two sessions; sleep deprivation (136 hours)" under the heading "enhanced techniques."[135] Moreover, the FBI interrogator, identified in the press as [redacted], who was questioning Zubaydah at the time he provided the Padilla information, told the OIG that "during the CIA interrogations Zubaydah 'gave up' Jose Padilla and identified several targets for future al-Qaeda attacks."[136] In other words, while Special Agent [redacted] obtained the information on Padilla, it was during a period that the FBI and CIA officers were using the CIA's techniques.

~~(TS~~[redacted]~~NF)~~ When the CIA and FBI interrogators entered the room late on the night of April 20, 2002, Abu Zubaydah was totally naked.[137] He had been subjected to at least four days of dietary manipulation and had been deprived of 126.5 hours of sleep during the past 136 hours.[138] According to FBI Special Agent Ali Soufan, they gave him a towel. They took some Coke and tea into the room and "started talking about different things." Sometime during the next morning, Abu Zubaydah "came back to his senses and he started cooperating again. And this is when he gave us Padilla."[139] Rather than concede that Abu Zubaydah was being subjected to a combination of at least three enhanced interrogation techniques while the FBI agents were using an additional rapport-building technique, the Study includes this perplexing footnote text: "While Abu Zubaydah was subjected to nudity and *limited* sleep deprivation prior to this date by the CIA, *he had been allowed to sleep* prior to being questioned by the FBI officers, who were *exclusively* using rapport-building interrogation techniques when the information was acquired."[140] Like the claim in this case study, this footnote is simply at odds with what really happened.

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[134] *See* CIA, [redacted] 10094, April 21, 2002, p. 2; CIA *Assessment of the accuracy of facts stated in the SSCI Minority's response to the Study of the Central Intelligence Agency's Detention and Interrogation Program,* June 27, 2013, p. 1.

[135] CIA, *Interrogations Using Standard and Enhanced Techniques, Abu Zubaydah*, undated, p. 1.

[136] Department of Justice Inspector General, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq,* May 2008, p. 69 (DTS 2008-2188).

[137] *See* SSCI Transcript, *Staff Interview of FBI Special Agent Ali Soufan,* April 28, 2008, p. 22. (DTS 2008-2411).

[138] *See* CIA, [redacted] 10094, April 21, 2002, p. 2; CIA, [redacted] 10090, April 21, 2002, p. 5.

[139] SSCI Transcript, *Staff Interview of FBI Special Agent Ali Soufan,* April 28, 2008, p. 19. (DTS 2008-2411).

[140] SSCI Study, Executive Summary, April 3, 2014, p. 226 n.1292 (emphasis added). *But see* FBI Draft Report on Abu Zubaida interview session from approximately 10:30 p.m., April 20, 2002, to about 7:00 a.m., on April 21, 2002, p. 1. It appears from this draft report that Abu Zubaydah was permitted a two-hour sleep break sometime *during* the FBI shift, which seems to clearly demonstrate that the FBI interrogators were aware that Abu Zubaydah was being subjected to sleep deprivation. [[The December 3, 2014, revision of footnote 1292 in the April 3, 2014 version of the Executive Summary continues to misrepresent the events surrounding Abu Zubaydah's interrogation by editing the footnote to read, "While Abu Zubaydah was subjected to sleep deprivation and nudity prior to this date by the CIA, he had been allowed to sleep *shortly* prior to being questioned *on this matter* by the FBI *special agents*, who were exclusively using rapport-building interrogation techniques when this information was acquired

~~(TS~~[redacted]~~NF)~~ There is no reasonable way to reconcile these facts with the claim that enhanced interrogation techniques played "no role" in Abu Zubaydah's identification of Jose Padilla. Sleep deprivation for 126.5 hours over a 136-hour period—which was hardly "limited"—was an enhanced interrogation technique regardless of whether the Department of Justice formally labeled it as such a couple of months later. The Study cannot dismiss the use of these enhanced interrogation techniques simply because they were used before the Department of Justice eventually approved them. The Study's assertion that the FBI was "exclusively" using rapport-building techniques fails to recognize the reality that this interrogation technique was used in combination with at least three other enhanced interrogation techniques. In judging what caused Abu Zubaydah to give up valuable intelligence, including information on Jose Padilla, it is impossible to separate or disaggregate enhanced interrogation techniques from rapport-building techniques after enhanced techniques are applied. Enhanced interrogation techniques are designed to compel detainees to cooperate with questioning and are used in conjunction with traditional questioning methods or interrogation techniques. The simple fact is that Abu Zubaydah gave up Padilla during that interrogation, after being subjected to enhanced interrogation techniques. It is simply not factually accurate for the Study to claim that Abu Zubaydah gave up the information on Padilla *before* he was subjected to enhanced interrogation techniques. Nor is it factually accurate to claim that enhanced interrogation techniques played no role in identifying Padilla as a terrorist threat.

~~(TS~~[redacted]~~NF)~~ The direct refutation of this Study claim illustrates the Study's flawed analytical methodology. As we detail in many of the case studies below, Zubaydah provided much of the key initial information that caused the Intelligence Community to recognize the significance of certain events, future threats, terrorist networks, and even potential assets. The Study repeatedly and incorrectly alleges that the FBI obtained this information prior to the application of CIA's enhanced interrogation techniques.[141] As a result, this mistaken allegation is taken as a settled premise in the Study's analysis of other case studies and related issues, which has the practical effect of undermining the Study's analyses of those matters.

~~(TS~~[redacted]~~NF)~~ Under its flawed methodology, the Study was able to disregard the significance of the large amount of information provided by Abu Zubaydah between April 15, 2002 and August 4, 2002, by incorrectly categorizing it as not being obtained from the use enhanced interrogation techniques. We now know that all of the information obtained from Abu Zubaydah on and after April 15, 2002, was provided *after* he had been subjected to enhanced interrogation. The practical result of this fact is that information obtained from Abu Zubaydah after April 15, 2002, can no longer be disregarded by the Study and must be factored into the assessment of the executive branch's effectiveness claims concerning the enhanced interrogation techniques along with the significant amount of important information obtained from Zubaydah following his second period of enhanced interrogation, which began on

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from Abu Zubaydah (who was covered with a towel)." (emphasis added). *Compare* SSCI Study, Executive Summary, April 3, 2014, p. 226 n.1292 *with* SSCI Study, Executive Summary, December 3, 2014, p. 230. n.1315.]]

[141] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 209-210, 230, 230 n.1314, 234; SSCI Study, Volume I, March 31, 2014, pp. 624 and 636; and SSCI Study, Volume II, April 1, 2014, pp. 57, 75, 75 n.274, 79, 343, 349, 358, 409, 445 n.2245, 530, 532, 535, and 1089.

August 4, 2002. Given the breadth of the information provided by Abu Zubaydah after April 15, 2002, and its attendant impact on subsequent intelligence efforts by the United States government and its allies, we conclude that this information supports the CIA's specific representations about the effectiveness of its Detention and Interrogation Program, including the use of enhanced interrogation techniques, in relation to the thwarting of the Dirty Bomb/Tall Buildings plot and the capture of Jose Padilla.

(U) *The Capture of Ramzi bin al-Shibh*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"A review of CIA records found no connection between Abu Zubaydah's reporting on Ramzi bin al-Shibh and Ramzi bin al-Shibh's capture.... While CIA records indicate that Abu Zubaydah provided information on Ramzi bin al-Shibh, there is no indication that Abu Zubaydah provided information on bin al-Shibh's whereabouts. Further, while Abu Zubaydah provided information on bin al-Shibh while being subjected to the CIA's enhanced interrogation techniques, he provided similar information to FBI interrogators prior to the initiation of the CIA's enhanced interrogation techniques."**[142]

Fact: ~~(TS~~[redacted]~~NF)~~ **CIA records demonstrate that Abu Zubaydah was subjected to enhanced interrogation techniques during two separate periods in April 2002 and August 2002. During these timeframes, Abu Zubaydah made several photographic identifications of Ramzi bin al-Shibh and provided information that bin al-Shibh had been in Kandahar at the end of 2001, but was then working with KSM in Karachi, Pakistan. More important, Abu Zubaydah provided information about how he would go about locating Hassan Ghul and other al-Qa'ida associates in Karachi. This information caused** [redacted] **Pakistani authorities to intensify their efforts and helped lead them to capture Ramzi bin al-Shibh and other al-Qa'ida associates during the Karachi safe house raids conducted on September 10-11, 2002.**

~~(TS~~[redacted]~~NF)~~ The claim made in this case study relies, in part, upon the factually incorrect premise that Abu Zubaydah was not subjected to enhanced interrogation techniques until August 4, 2002.[143] As previously demonstrated, Abu Zubaydah was first subjected to the enhanced interrogation techniques of sleep deprivation, nudity, and dietary manipulation on April 15, 2002.[144] Abu Zubaydah's second period of enhanced interrogation, which included the use of the waterboard, began on August 4, 2002.[145]

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[142] SSCI Study, Executive Summary, December 3, 2014, p. 318.

[143] *Compare* SSCI Study, Executive Summary, December 3, 2014, p. 323 *with supra*, pp. 33-36.

~~(TS~~[redacted]~~NF)~~ The Study also incorrectly claims that "there is no indication in CIA records that Abu Zubaydah provided information on bin al-Shibh's whereabouts."[146] While the CIA Study Response appears to concede this point unnecessarily,[147] CIA and FBI records establish that Abu Zubaydah did provide locational information about Ramzi bin al-Shibh. Specifically, he noted that he had seen bin al-Shibh in Kandahar, Afghanistan, at the end of 2001, and that he was aware that bin al-Shibh was presently working with KSM in Karachi, Pakistan.

~~(TS~~[redacted]~~NF)~~ On April 18, 2002, during Abu Zubaydah's first period of enhanced interrogation, an FBI interrogator showed him a photograph of Ramzi bin al-Shibh. According to the FBI, Abu Zubaydah said that he knew the man in the photograph as "Ramzi bin al-Shiba" and that he had seen him with a group of Arabs shortly after a missile strike in Kandahar, Afghanistan, on the house of Taib Agha, Mullah Omar's secretary.[148] This information appears to place bin al-Shibh in Kandahar in the November 2001 timeframe, roughly five months prior to this interview with Abu Zubaydah. On June 2, 2002, the FBI again showed Abu Zubaydah a photograph of bin al-Shibh. This time Abu Zubaydah provided some additional information, stating that he knew this man as "Al-Sheeba," whom he saw with KSM in Kandahar around December 2001, near the end of Ramadan. He also noted that al-Shibh speaks Arabic like a Yemeni and that he had seen al-Shibh in the media after the September 11, 2001, terrorist attacks.[149] On August 21, 2002, during his second period of enhanced interrogation, Abu Zubaydah "immediately recognized the photograph of Ramzi bin al Shibh."[150] Abu Zubaydah mentioned that he had heard "that al-Shibh had stayed at the secret guest house in Qandahar that Mukhtar had established for the pilots and others destined to be involved in the 9/11 attacks."[151]

~~(TS~~[redacted]~~NF)~~ On May 19, 2002, and May 20, 2002, Abu Zubaydah identified a picture of bin al-Shibh as "al-Shiba" and "*noted that he is always with (KSM).*"[152] If that assertion was true, then Abu Zubaydah was essentially suggesting that bin al-Shibh was with KSM in or around Karachi, Pakistan, because he had also informed his interrogators that KSM was located in or around Karachi.[153] Abu Zubaydah confirmed this association while being subjected to enhanced interrogation on August 21, 2002, when he stated that bin al-Shibh was "one of the operatives working for Mukhtar aka Khalid Shaykh Mohammad,"[154] again suggesting that bin al-Shibh was likely in Karachi.

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[144] *See supra,* pp. 33-36. The CIA began subjecting Abu Zubaydah to monitored sleep deprivation on April 15, 2002, the day he was discharged from the hospital. He was continued on a liquid diet and subjected to nudity. All three of these interrogation techniques were subsequently and formally categorized by the Department of Justice as "enhanced interrogation techniques." *See* CIA, [redacted] 10043, April 15, 2002, p. 2; CIA, [redacted] 10047, April 16, 2002, p. 2; Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, May 30, 2005, *Re: Application of United States Obligations under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High value Al Qaeda Detainees* (DTS 2009-1810, Tab-11).

[145] *See* CIA, [redacted] 10586, August 04, 2002, p. 4.

[146] SSCI Study, Executive Summary, December 3, 2014, p. 318.

[147] *See* CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 23 ("It is true that Abu [Zubaydah] provided no information *specifically* on Bin al-Shibh's whereabouts . . . .") (emphasis added).

[148] *See* FBI draft report of the interrogation of Abu Zubaydah, April 18, 2002, 6:10 a.m. to 10:40 a.m., p 1.

[149] *See* FBI draft report of the interrogation of Abu Zubaydah, June 3, 2002, 4:00 p.m. to 8:30 p.m., p 3; CIA, [redacted] 10428, June 7, 2002, p. 5.

[150] CIA, [redacted] 10656, August 21, 2002, p. 2. *See also* CIA, [redacted] 10654, August 21, 2002, p. 1-2.

[151] CIA, [redacted] 10656, August 21, 2002, p. 3.

[152] CIA, DIRECTOR [redacted] May 27, 2002, p. 4.

~~(TS~~[redacted]~~NF)~~ The Study's claim that it found "no connection" between Abu Zubaydah's reporting and Ramzi bin al-Shibh's capture is the result of poor analysis. On August 20, 2002, during his second period of enhanced interrogation, when asked how he would find his former al-Qa'ida associates if he were set free, Abu Zubaydah told CIA interrogators that he would contact the well-known associate of Hassan Ghul, who could put him in touch with Hassan Ghul and other senior al-Qa'ida members.[155] The Study frames this interchange much more narrowly. It asserts that "Abu Zubaydah was asked specifically how he would find Hassan Ghul. In response, Abu Zubaydah provided corroborative reporting: that Hassan Ghul could possibly be located through a well-known associate."[156] This narrow framing of the question and response enables the Study to conclude incorrectly that the capture of bin al-Shibh was an "unexpected" result of the raids that failed to capture Hassan Ghul.[157] The Study's approach fails to understand the causal link between Abu Zubaydah's information and the successful Karachi safe house raids of September 11, 2002, which resulted in the collection of important intelligence information and the capture of 11 al-Qa'ida associates, including Ramzi bin al-Shibh.

~~(TS~~[redacted]~~NF)~~ About six weeks before Abu Zubaydah identified the significance of the well-known associate of Hassan Ghul, Pakistani authorities [redacted] raided the well-known associate of Hassan Ghul's home [redacted] in early July 2002. The well-known associate of Hassan Ghul was interviewed on the spot and cooperated with Pakistani authorities [redacted] The well-known associate of Hassan Ghul even sent [redacted] with the Pakistani officers to identify a home where Hassan Ghul formerly resided.[158] The CIA officers observed that the location was "extremely close to (if not an exact match)" to a location where KSM once resided, according to a June 18, 2002, report from the FBI.[159]

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[153] The draft report of this interview states: (1) "Abu Jafar told [Abu Zubaydah] that he and his friend had to get to Karachi because they had business with Muhktar"; (2) "This [group of 11 Filipinos or Malaysians] was on their way to Karachi to meet up with Muhktar"; (3) "the American and Kenyan [Zubaydah] sent to Muhktar in mid-March 2002 . . . [Zubaydah] actually sent them to Hassan Ghul and Amanullah (in Karachi) who would have then arranged for them to be taken to Muhktar"; and (4) "Subject advised that, prior to his arrest he was trying to coordinate a trip to Karachi to meet with Muhktar." FBI draft report of the interrogation of Abu Zubaydah, May 20, 5:25 p.m. to 8:40 p.m., pp. 3 and 5.

[154] CIA, DIRECTOR [redacted] August 26, 2002, p. 4.

[155] *See Captures Resulting From Detainee Information: Four Case Studies*, November 26, 2003, p. 2; CIA, [redacted] 10644, August 20, 2002, pp. 2-3; and CIA, ALEC [redacted] August 29, 2002, p. 2.

[156] SSCI Study, Executive Summary, December 3, 2014, p. 323.

[157] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 75, 318, and 320.

[158] *See* CIA, CIA CABLE 11755 [redacted]

[159] *See* CIA, CIA CABLE 11755 [redacted]

~~(TS~~[redacted]~~NF)~~ The Study dismisses Abu Zubaydah's identification of the well-known associate of Hassan Ghul as mere "corroborative reporting," and does not attach the appropriate significance to this information because of its rigid adherence to its flawed analytical methodology, which presumes that anything corroborative cannot be considered as "otherwise unavailable actionable intelligence."[160] The facts tell a different story. Abu Zubaydah was a recognized senior member of al-Qa'ida who had direct ties to multiple high-ranking terrorists, including Usama Bin Ladin. The CIA was focused on Hassan Ghul, another well-connected senior member of al-Qa'ida, and "other" al-Qa'ida associates of Abu Zubaydah. Therefore, Abu Zubaydah's disclosures were deemed by the CIA as significant and actionable intelligence. When Abu Zubaydah identified the well-known associate of Hassan Ghul as the first person he would contact to reconnect with Hassan Ghul and other al-Qa'ida associates, it is very likely that collecting additional intelligence from the well-known associate of Hassan Ghul became a top operational priority for U.S. and Pakistani officials.

~~(TS~~[redacted]~~NF)~~ It is not surprising that CIA Headquarters [redacted] on August 29, 2002, to request that Pakistani officials "reinterview the well-known associate of Hassan Ghul for additional intelligence on Hassan Ghul."[161] On September 3, 2002, [redacted] reported that Pakistani officials had re-interviewed the well-known associate of Hassan Ghul an unknown number of times and that these officials noted that at times the well-known associate of Hassan Ghul contradicted himself.[162] On September 9, 2002, Pakistani officials returned to the well-known associate of Hassan Ghul's home and interviewed another well-known associate of Hassan Ghul who had recently returned to [redacted]. The other well-known associate of Hassan Ghul cooperated and disclosed the location of [redacted] Hassan Ghul's apartment, which was promptly raided but found to be empty.[163] Pakistani authorities interviewed [redacted] and learned that while Hassan Ghul had vacated the apartment, he was scheduled to return to the complex [redacted] The Pakistani authorities subsequently placed the complex under surveillance in an effort to capture Hassan Ghul.[164]

~~(TS~~[redacted]~~NF)~~ On September 10, 2002, Pakistani authorities arrested two individuals believed to be Hassan Ghul and his driver outside of the apartment complex.[165] These individuals turned out to be Muhammad Ahmad Ghulam Rabbani, a.k.a. Abu Badr and Muhammad Madni, Abu Badr's driver.[166] Information obtained from Madni led to a series of raids on September 11, 2002, by Pakistani authorities of the identified safe houses, resulting in the arrest of 11 individuals, including Ramzi bin al-Shibh, Abdul Rahim Gulam Rabbani, Hassan

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[160] *See* SSCI Study, Executive Summary, December 3, 2014, p. 323.

[161] CIA, ALEC [redacted] August 29, 2002, p. 3.

[162] *See* CIA, CIA CABLE 12207, September 5, 2002, p. 2.

[163] *See* CIA, CIA CABLE 12249, September 9, 2002, p. 2.

[164] *See* CIA, CIA CABLE 12249, September 9, 2002, pp. 2-3.

[165] *See* CIA, CIA CABLE 12251, September [redacted] 2002, p. 2; CIA, CIA [redacted] [redacted] September [redacted] 2002, p. 2.

[166] *See* CIA, CIA CABLE 33363, September 11, 2002, p. 2. Abu Badr is the brother of Abdul Rahim Gulam Rabbani, aka Abu Rahama, who ran the KSM safe house used by the 9/11 al-Qa'ida terrorists. Abu Zubaydah made a photographic identification of Abu Badr and called him KSM's man in Karachi. *See* CIA, ALEC [redacted] CIA, CIA CABLE 12267, September 11, 2002, p. 2.

Muhammad Ali bin Attash, and other al-Qa'ida members.[167] These raids also resulted in the collection of important al-Qa'ida operational documents, including financial records and the coded "perfume letter."[168]

~~(TS~~[redacted]~~NF)~~ The Study's claims with respect to the capture of Ramzi bin al-Shibh do not hold up under a close examination of the CIA documentary record. There was a direct causal connection between the information provided by Abu Zubaydah during his second period of enhanced interrogation and bin al-Shibh's capture. Abu Zubaydah had informed his interrogators that bin al-Shibh was one of KSM's operatives in Karachi. Zubaydah confirmed the importance the well-known associate of Hassan Ghul to locate Hassan Ghul and other al-Qa'ida associates operating in Karachi, including bin al-Shibh.

(U) Since the Study's claims on this topic do not hold up to factual scrutiny, its criticisms of the CIA representations with respect to Ramzi bin al-Shibh and President Bush's references to bin al-Shibh in his September 6, 2006, speech on the CIA's Detention and Interrogation Program are not valid. The CIA said Abu Zubaydah's "knowledge of al-Qa'ida lower-level facilitators, modus operandi and safehouses . . . played a key role in the ultimate capture of Ramzi bin al-Shibh."[169] Far from a "misrepresentation," that statement was completely accurate and consistent with the circumstances that led to bin al-Shibh's ultimate capture. Similarly, the text in President Bush's September 6, 2006, speech on the CIA's Detention and Interrogation Program noting that "the information Zubaydah provided helped lead to the capture of Binalshibh" was also accurate.[170]

(U) The capture of Ramzi bin al-Shibh and the other al-Qa'ida terrorists during [redacted] raids of September 10-11, 2002, were stunning operational successes, made possible, in part, by the CIA's Detention and Interrogation Program.

(U) *The Capture of Khalid Shaykh Mohammad*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"[T]here are no CIA records to support the assertion that Abu Zubaydah, Ramzi bin al-Shibh, or any other CIA detainee played any role in the 'the planning and execution of the operation that captured Khalid Sheikh Mohammed.'"[171]**

Fact: ~~(TS~~[redacted]~~NF)~~ **Information obtained from CIA detainee Abu Zubaydah was essential to furthering the CIA's understanding of KSM's role in the September 11, 2001, terrorist attacks and helped lead to the**

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[167] *See* CIA, ALEC [redacted] September 11, 2002, pp. 2-3. Madni informed the arresting officers that Abu Badr was a "major al-Qa'ida [facilitator]." *See also* CIA, CIA CABLE 12267, September 11, 2002, pp. 2-4. He also gave [redacted] information about the locations of al-Qa'ida-affiliated residences and safe houses in Karachi. CIA, CIA CABLE 12251, September [redacted] 2002, p. 2; CIA, [redacted] [redacted] [redacted] September [redacted], 2002, pp. 3-4.

[168] *See* CIA, ALEC [redacted] October 3, 2002, p. 2.

[169] CIA, Memorandum to the Inspector General from James Pavitt, CIA Deputy Director for Operations, Comments to Draft IG Special Review, *Counterterrorism Detention and Interrogation Activities,* February 27, 2004.

[170] President George W. Bush, *Trying Detainees; Address on the Creation of Military Commissions,* Washington, D.C., September 6, 2006.

[171] SSCI Study, Executive Summary, December 3, 2014, p. 327.

capture of Ramzi bin al-Shibh. The [redacted] **interrogations of bin al-Shibh and DETAINEE R provided key insights about KSM**[redacted] **Information produced through detainee interrogation was pivotal to the retention of a key CIA asset whose cooperation led directly to the capture of KSM.**

~~(TS~~[redacted]~~NF)~~ The Study almost exclusively attributes the capture of KSM to a "unilateral CIA asset."[172] We agree with the Study that this asset provided information that was crucial to KSM's capture in Rawalpindi, Pakistan, on March 1, 2003.[173] We also acknowledge that the CIA had met with the asset as early as fall 2001 and that the asset had provided good intelligence information related to KSM. However, the Study fails to acknowledge the cascading sequence of revelations that began with Abu Zubaydah's identification of the importance of the well-known associate of Hassan Ghul and culminated in the information provided by the asset which led directly to the capture of KSM. Moreover, the Study does not recognize that, but for the fortuitous intervention of a CIA officer—who was aware of recently obtained detainee information which corroborated the asset's claims concerning KSM—the asset would have been terminated as a CIA source prior to providing the crucial pre-capture information about KSM.[174]

~~(TS~~[redacted]~~NF)~~ As stated previously, information obtained from Abu Zubaydah about KSM prior to the use of enhanced interrogation techniques was key to the CIA's realization of KSM's operational significance. The CIA disseminated an intelligence report, [redacted] within the Intelligence Community [redacted] detailing KSM's identification as "Mukhtar" and his role as the mastermind of 9/11.[175] Responses [redacted] indicated they followed up and requested more information [redacted] on him.[176] Zubaydah's FBI interrogator Ali Soufan also described the information from Zubaydah on KSM as significant. In 2008, Soufan told Committee staff that when Zubaydah provided that information, "we had no idea at the time that Mukhtar was the KSM from 9/11. . . . Because we had been working so diligently on trying to figure out the puzzles of 9/11 and who is Mukhtar, and when Abu Zubaydah said that, I think the picture was complete."[177] Also, on May 13, 2009, Soufan told the Senate Judiciary Committee that prior to Zubaydah providing information on KSM's role as the mastermind of the 9/11 attacks, "we had no idea of KSM's role in 9/11 or of his importance in the al Qaeda leadership structure."[178]

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[172] SSCI Study, Executive Summary, December 3, 2014, p. 327.

[173] [redacted]

[174] *See* CIA Oral History Program, *Interview of [REDACTED] by [REDACTED]*, October 14, 2004, pp. 5-7.

[175] *See* CIA, [redacted]

[176] *See* CIA, [redacted]

[177] SSCI Transcript, *Staff Interview of FBI Special Agent, Ali Soufan*, April 28, 2008 (DTS 2008-2411).

[178] Ali Soufan, Statement for the Record, before the United States Senate Committee on the Judiciary, May 13, 2009.

~~(TS~~[redacted]~~NF)~~ The chain of events leading to KSM's capture begins in earnest with Zubaydah's interrogation on August 20, 2002, when, during his second period of being subjected to enhanced interrogation techniques, he was asked how he would go about locating Hassan Ghul and other al-Qa'ida associates if he were to be released.[179] Zubaydah responded to this question by stating that he would reach out to [the well-known associate of Hassan Ghul] [redacted] to reconnect with Ghul and others.[180] As explained in greater detail in our discussion about the capture of Ramzi bin al-Shibh, this information from Zubaydah caused [redacted] Pakistani authorities to intensify their investigative efforts [the well-known associate of Hassan Ghul] [redacted] who had been previously located, interviewed, and surveilled.[181] These investigative efforts resulted in [redacted] Pakistani raids of safe houses in Karachi on September 10-11, 2002.[182] Ramzi bin al-Shibh was among those captured during these raids.

~~(TS~~[redacted]~~NF)~~ Ramzi bin al-Shibh becomes one of the next links in the effort to track down and capture KSM. Shortly after his capture in Karachi, bin al-Shibh was transferred [redacted] In late 2002, [redacted] Ramzi indicated [redacted] that the best way to find KSM is to find [redacted] 'Ammar' who is also in Karachi."[183] A few days later, in a photographic identification, bin al-Shibh confirmed that 9/11 financier, Ali Abdul Aziz Ali, was Ammar al-Baluchi, [redacted][184] The Study asserts that "Ammar al-Baluchi played no role in the operation that captured KSM, which centered around [redacted][185] While Ammar might not have played a direct role in the "operation" that captured KSM, bin al-Shibh's key insights about Ammar clarified his importance such that Alec Station highlighted bin al-Shibh's photo-identification of Ammar al-Baluchi as a breakthrough.[186]

~~(TS~~[redacted]~~NF)~~ Moreover, according to the CIA, bin al-Shibh's information about Ammar al Baluchi was used to interrogate DETAINEE R.[187]This claim is supported by a CIA requirements cable which contained numerous questions concerning KSM [redacted][188] In late 2002, DETAINEE R provided background and physical details on KSM [redacted][189] [redacted] the next day, DETAINEE R [redacted] [redacted]

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[179] See CIA, ALEC [redacted] August 29, 2002, pp. 2-3
[180] See CIA, ALEC [redacted] August 29, 2002, p. 2-4.
[181] *See supra*, pp. 37-41.
[182] *See* CIA, CIA CABLE 12251, September [redacted], 2002, p. 2; CIA, CIA 468392 / [redacted] September [redacted] 2002, pp. 3-4.
[183] [redacted]
[184] [redacted]
[185] [redacted]
[186] *See* CIA, CIA CABLE [redacted] September 30, 2002, p. 2.
[187] *See* CIA, CIA CABLE 10118 [redacted]
[188] *See* CIA, CIA CABLE 530341 [redacted]
[189] *See* CIA, CIA CABLE 10103 [redacted]

[redacted][190] The next day [redacted] the CIA interrogators continuing their questioning of DETAINEE R on the topic of KSM [redacted] DETAINEE R provided [redacted][191] In late 2002 [redacted] DETAINEE R was rendered into CIA custody and subjected to enhanced interrogation techniques. [redacted] CIA [redacted] reported that [redacted] "said in no uncertain terms that none of the information provided by DETAINEE R has been of any use and [redacted] wasted time here chasing people and places that are probably bogus." CIA [redacted] urged interrogators to readdress the issues with DETAINEE R and acquire more—and more accurate—information.[192] [redacted] DETAINEE R was asked to provide as much locational information as possible on [redacted]

~~(TS~~[redacted]~~NF)~~ This brings us to ASSET X, who was initially undervalued by the CIA, despite his repeated claims that he could help locate KSM in Pakistan. In [redacted] 2001 the asset declined to work with the CIA because his proposed financial compensation package had been rejected. In [redacted] 2002, the Counterterrorism Center directed recruiters to reconnect with ASSET X.[194] By [redacted] of that same year, he was assigned to a new case officer. The case officer was unfamiliar with ASSET X's potential to provide information that might lead to the location of KSM, and the cables he sent to CIA Headquarters in pursuit of guidance in handling the asset went unread and unanswered when they were re-routed to a compartmented team which had been disbanded.[195]

~~(TS~~[redacted]~~NF)~~ Having heard nothing back from CIA Headquarters, the case officer was on the verge of terminating the CIA's relationship with the asset in [redacted] 2002. When the case officer met with his Chief of Base to discuss the termination, by chance, another CIA officer with prior operational contact with the asset[196] overheard their conversation as he was waiting to meet with the Chief of Base. This other CIA officer [redacted] having come from [redacted] that reported information from DETAINEE R [redacted] The officer's current mission included trying to track down KSM. He recognized ASSET X's information [redacted] He advised ASSET X's current case officer and the Chief of Base against proceeding with the termination, and joined in a meeting between the current case officer and ASSET X]. ASSET X was subsequently able to provide information that resulted in KSM's capture on March 1, 2003.

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[190] *See* CIA, CIA CABLE 10120[redacted]
[191] *See* CIA, CIA CABLE 10140[redacted]
[192] *See* CIA, CIA CABLE 10250[redacted]
[193] *See* CIA[redacted]CIA CABLE 30266, [redacted]
[194] *See* CIA Oral History Program, *Interview of [REDACTED] by [REDACTED]*, October 14, 2004, p. 3.
[195] *See* CIA Oral History Program, *Interview of [REDACTED] by [REDACTED]*, October 14, 2004, p. 4.
[196] [redacted]
[197] [redacted]

~~(TS~~[redacted]~~NF)~~ Although ASSET X's contributions were clearly important to KSM's capture, the true linchpin in the operation was the visiting officer's familiarity with the crucial information that the detainees had provided about KSM. Information from DETAINEE R background and [redacted] information on KSM [redacted] lies at the end of a causal chain that traces back through Ramzi bin al-Shibh and Abu Zubaydah. Absent this collective body of information, the requisite understanding of KSM's activities, organizational stature, [redacted] would have eluded analysts, to make nothing of the fact ASSET X's relationship with the CIA would have been terminated in [redacted] 2002; months in advance of KSM's March 2003 capture.

(U) *The Disruption of the Karachi Hotels Bombing Plot*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"[T]he CIA's enhanced interrogation techniques—to include the waterboard—played no role in the disruption of the Karachi Plot(s)."[198]**

Fact: **(U) CIA documents show that key intelligence collected through the CIA's Detention and Interrogation Program, including information obtained after the use of enhanced interrogation techniques, played a major role in disrupting the Karachi hotels bombing plot.**

~~(TS~~[redacted]~~NF)~~ As the Study notes, the reference to the "Karachi Plot(s)" refers to:

> terrorist plotting that targeted a variety of U.S. and western interests in the Karachi area, to include the U.S. Consulate, named hotels near the airport and beach, U.S. vehicles traveling between the Consulate and the airport, U.S. diplomatic housing, potential sniper attacks against U.S. personnel, as well as Pakistan's Faisal Army Base.[199]

~~(S//NF)~~ The CIA has acknowledged that on several occasions, including in prominent representations such as President's Bush's 2006 speech, it mischaracterized the impact of the reporting acquired from detainees on the Karachi plots. Instead of claiming that the information "helped stop a planned attack on the U.S. Consulate in Karachi," the CIA should have stated that it "revealed ongoing attack plotting against the U.S. official presence in Karachi that prompted the Consulate to take further steps to protect its officers."[200]

~~(TS~~[redacted]~~NF)~~ Our analysis will demonstrate that the intelligence collected through the CIA's Detention and Interrogation Program, including information obtained after the use of enhanced interrogation techniques, played a key role in the disruption of the Karachi hotels bombing plot. The Study notes that the CIA had information regarding the Karachi terrorist plotting as early as September 11, 2002, in the form of the "perfume letter," which was obtained during a [redacted] raid [redacted] of a safe house in Karachi, Pakistan.[201] What the Study fails to point out, however, is that Abu Zubaydah provided crucial information which played a big role in leading to the [redacted] raids of the al-Qa'ida safe houses on September 11, 2002—the same raids that yielded the "perfume letter" and disrupted the Karachi hotels plot. Specifically, [redacted] Pakistani raids were the direct result of information provided by Abu Zubaydah on August 20, 2002, during his second period of enhanced interrogation.[202]

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[198] SSCI Study, Executive Summary, December 3, 2014, p. 242.

[199] SSCI Study, Executive Summary, December 3, 2014, p. 239; *see also* CIA, [redacted] 11454, April 30, 2003, pp. 1-4.

[200] CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 6.

~~(TS~~[redacted]~~NF)~~ When asked how he would go about finding his former al-Qa'ida associates if he were set free, Abu Zubaydah told CIA interrogators that he would contact a well-known associate of Hassan Ghul who could put him in touch with Ghul and other senior al-Qa'ida members.[203] CIA officers then asked Pakistani officials to question the well-known associate of Hassan Ghul, who on September 7, 2002, provided vague information the Pakistanis assessed was untruthful.[204] The Pakistanis continued to watch the residence and, when another well-known associate of Hassan Ghul returned to the residence, questioned the other well-known associate of Hassan Ghul as well. The other well-known associate of Hassan Ghul cooperated and provided the location of Ghul's last apartment.[205] This information led to the arrest, on September 9, 2002, of an individual thought to be Ghul[206], but who turned out to be another al-Qa'ida terrorist.[207] Abu Zubaydah then positively identified this terrorist as Abu Badr, "KSM's driver and KSM's man in Karachi," facilitating the movement of al-Qa'ida operatives.[208] Badr's driver, who was also arrested, identified information about several al-Qa'ida safehouses and residences in Karachi.[209]

~~(TS~~[redacted]~~NF)~~ Based on this information, on September 11, 2002, [redacted] conducted [redacted] raids, which resulted in the arrests of several terrorists and key documents, including one dubbed the "perfume letter" because the word "perfumes" was used as a codeword.[210] In this May 2002 letter, KSM told Hamza Zubayr, a terrorist killed in the same raids, he would provide him with $30,000, with another $20,000 available upon request, and that "we have acquired the green light that is strong for the [hotels]" clearly indicating a plot of some kind.[211] More troubling, the letter suggested "[increasing] the number to make it three instead of one."[212] Were it not for Abu Zubaydah's original information about the significance of the well-known associate of Hassan Ghul, which led to the Karachi safe house raids, it is unclear if the "perfume letter" would ever have been found.

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[201] *See* SSCI Study, Executive Summary, December 3, 2014, p. 242; CIA, ALEC [redacted] October 03, 2002, p. 2; *and* CIA, ALEC [redacted] October 3, 2002, pp. 2-4.

[202] *See* CIA, *Captures Resulting From Detainee Information: Four Case Studies*, November 26, 2003, p.2.

[203] *See* CIA, *Captures Resulting From Detainee Information: Four Case Studies*, November 26, 2003, p.2; CIA, [redacted] 10644, August 29, 2002, pp. 1-2; CIA, ALEC [redacted] August 29, 2002, pp. 2-3.

[204] *See* CIA, ALEC [redacted] CIA, CIA CABLE 12207, September 05, 2002, pp. 2-3.

[205] See CIA, CIA CABLE 12249, September 09, 2002, p. 2.

[206] See CIA, CIA CABLE 12251, September [redacted], 2002, p. 2.

[207] See CIA, CIA CABLE 12254, September 10, 2002, p. 4; CIA, ALEC [redacted]

[208] CIA, ALEC [redacted]

[209] See CIA, CIA CABLE 12251, September [redacted], 2002, p. 2.

[210] See CIA, CIA CABLE 12267, September 11, 2002, p. 2; CIA, CIA CABLE [redacted] October 03, 2002, p. 2.

[211] CIA, CIA CABLE 33804, September 19, 2002, p. 4; After his capture on April 1, 2003, KSM would confirm that the Karachi plot referenced in the "perfume letter" was the plot directed at three named hotels, chosen because they were frequented by American and German guests. *See* SSCI Study, Volume II, April 1, 2014, pp. 592-593.

[212] CIA, CIA CABLE 33804, September 19, 2002, p. 4.

~~(TS~~[redacted]~~NF)~~ Abu Zubaydah's value, however, did not end with providing the true significance of the well-known associate of Hassan Ghul. Zubaydah subsequently translated the "perfume letter" for the CIA, identified the key word in the letter—"hotels"—that had not been previously translated, and told the CIA that the reference to "Khallad" in the letter may be the "one legged Yemeni." A CIA analyst noted that the one-legged Yemeni was terrorist Khallad bin Attash, who was later arrested and admitted to his involvement in the plot.[213]

~~(TS~~[redacted]~~NF)~~ By early October 2002, the CIA had completed a search of the individuals identified in the "perfume letter" and concluded that most of those who had been assigned roles in support of the hotels operation had been arrested or killed by the Pakistani authorities during the September 11, 2002 raids.[214] Although the Karachi hotels plot had been thwarted by these raids, at least one of the individuals identified by Abu Zubaydah in the letter, Khallad bin Attash, a known al-Qa'ida operative, remained at large.[215] Eventually, on April 28, 2003, [redacted] was able to capture several al-Qa'ida operatives, including Ammar al-Baluchi and bin Attash. [redacted] also successfully confiscated explosives, detonators, and ammunition as part of the capture operation.[216]

~~(TS~~[redacted]~~NF)~~ On May 17, 2003, Khallad bin Attash confirmed that Ammar al-Baluchi had intended to use the explosives stashed for that operation to target the U.S. Consulate.[217] The next day, [redacted] indicated its clear understanding of how these interrelated Karachi plot events had improved the U.S. security posture in the area when it noted that although its options to enhance security:

> may appear limited . . . [redacted] and what we have seen over past months as an increased aggressiveness of local authorities have provided some protection from these threats. We point specifically to the 11 September 2002 raids in Karachi, the 1 March 2003 take-down of KSM, and to the recent arrests of al-Baluchi and ba Attash as examples of how [redacted] have thwarted attacks.[218]

(U) *The Heathrow and Canary Wharf Plots*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"[C]ontrary to CIA representations, information acquired during or after the use of the CIA's enhanced interrogation techniques played no role in 'alert[ing]' the CIA to the threat to—or the**

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[213] See E-mail from: CIA analyst; to: [redacted]; subject: *Re: AZ on the perfume letter;* date: October 10, 2002, at 9:50 AM, p. 6.

[214] *See CIA,* ALEC [redacted] October 3, 2002, pp. 2-12.

[215] *See CIA,* ALEC [redacted] October 3, 2002, pp. 2-12.

[216] *See* CIA, CIA CABLE 45028, [redacted]

[217] *See* CIA, [CIA CABLE] 38405, May 17, 2003, p. 4.

[218] CIA, CIA CABLE 1451[redacted]

'disrupt[ing]' the plotting against—Heathrow Airport and Canary Wharf."[219]

Fact: ~~(TS~~[redacted]~~NF)~~ **The CIA interrogation program played a key role in disrupting the Heathrow and Canary Wharf plotting.**

~~(TS~~[redacted]~~NF)~~ Despite its claim that information acquired during or after the use of enhanced interrogation techniques played "no role" in the disruption of the Heathrow Airport and Canary Wharf plots, the Study twice concedes these plots were "fully disrupted" with the detentions of Ramzi bin al-Shibh, KSM, Ammar al-Baluchi, and Khallad bin Attash.[220] The Study then incorrectly asserts that "[t]here are no CIA records to indicate that any of the detainees was captured as a result of CIA detainee reporting."[221] As we have previously demonstrated, information obtained from the CIA interrogation program played a key role in the capture of al-Shibh and KSM.[222] Also, Ramzi bin al-Shibh provided information about Ammar al-Baluchi and Abu Zubaydah provided information about Khallad bin Attash prior to their arrests.[223] The same detainee information that helped lead to the capture of these terrorists also played a key role in fully disrupting the Heathrow Airport and Canary Wharf plots.

~~(TS~~[redacted]~~NF)~~ Thus far, the following analytical dominoes have fallen in relation to the Heathrow and Canary Wharf plots: (1) "There is considerable evidence that the information Abu Zubaydah provided identifying KSM as "Mukhtar" and the mastermind of 9/11 was significant to CIA analysts, operators, and FBI interrogators";[224] (2) "Abu Zubaydah provided information about how he would go about locating Hassan Ghul and other al-Qa'ida associates in Karachi. This information caused [redacted] Pakistani authorities to intensify their efforts and helped lead them to capture Ramzi bin al-Shibh and other al-Qa'ida associates during the Karachi safe house raids conducted on September 10-11, 2002";[225] (3) "Information produced through detainee interrogation was pivotal to the retention of a key CIA asset whose cooperation led directly to the capture of KSM";[226] (4) Zubaydah told the CIA that the reference to "Khallad" in the letter may be the "one legged Yemeni";[227] and (5) Pakistan's arrest of al-Qa'ida terrorists Ammar al-Baluchi and Khallad Bin Attash disrupted the al-Qa'ida plot to attack the U.S. Consulate in Karachi.[228] Taken together, these significant operational accomplishments, most of them resulting from information obtained from CIA detainees, also had the added bonus of disrupting the Heathrow and Canary Wharf plots.

~~(TS~~[redacted]~~NF)~~ The Study undercuts its own argument that the CIA interrogation program played no role in the disruption of the Heathrow and Canary Wharf plotting almost immediately after its narrative on the plots begins. The Study says "records indicate the Heathrow Airport plotting had not progressed beyond the initial planning stages when the operation was fully disrupted with the detention of Ramzi bin al-Shibh (detained on September 11, 2002), KSM (detained on March 1, 2003), Ammar al-Baluchi (detained on April 29, 2003), and Khallad bin Attash (detained on April 29, 2003)."[229] As we explained previously, Ramzi bin al-Shibh was detained as a result of information provided by Abu Zubaydah during a period of enhanced interrogation.[230] By asserting that the detention of Ramzi bin al-Shibh played a role in the disruption of the plot, certainly the detainee information that led to his detention also played a role in the plot's disruption.

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[219] SSCI Study, Executive Summary, December 3, 2014, pp. 297-298.
[220] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 295 and 299.
[221] SSCI Study, Executive Summary, December 3, 2014, p. 299.
[222] *See supra*, pp. 37-45.
[223] *See supra*, pp. 43 and 47.
[224] *See supra*, pp. 29-33.
[225] *See supra*, pp. 37-41.
[226] *See supra*, pp. 41-45.
[227] E-mail from: CIA analyst; to: [redacted]; subject: *Re: AZ on the perfume letter;* date: October 10, 2002, at 9:50 AM, p. 6.
[228] *See* CIA Study Response, *Case Studies (Tab C)*, p. 6.

~~(TS~~[redacted]~~NF)~~ Additionally, while the Study claims that the CIA already had information in its possession prior to the detention and interrogation of those detainees the CIA credits with providing information on the plot (KSM, Ammar al-Baluchi, and Khallad bin Attash), much of that reporting, including identification of Heathrow airport as the target, came from interrogations of Ramzi bin al-Shibh occurring prior to CIA custody. Again, [redacted] were only able to detain and question Ramzi bin al-Shibh because information provided by Abu Zubaydah in CIA detention led to bin al-Shibh's arrest.

~~(TS~~[redacted]~~NF)~~ While the Study cites a CIA document to support its claim that the plot "was fully disrupted" with the arrests of the four previously mentioned terrorists, the CIA document says that the plot was "disrupted," not "fully disrupted."[231] Perhaps for that reason, the CIA continued to interrogate detainees about the plot, long after the arrests of both Ramzi bin al-Shibh and KSM, to uncover more details about the plot and any operatives. For example, the CIA confronted Ramzi bin al-Shibh and KSM about e-mail addresses found in KSM's computer that belonged to the two Saudi-based operatives who could have been used in the plot, Ayyub and Azmari.[232] Although the Study notes that these two operatives were "unwitting" of the Heathrow plot, they appear to have been willing terrorist operatives, as the CIA learned that Ayyub participated in a suicide attack in Riyadh, Saudi Arabia on May 12, 2003, that killed 36 individuals and injured more than 160 others. Azmari was arrested on July 1, 2003 for his connections to the attack.[233]

~~(TS~~[redacted]~~NF)~~ Additionally, as noted in several papers and briefings by the CIA, in mid-March 2003, the CIA questioned KSM about a hand-drawn illustration in his notebook of what appeared to be an I-beam with the term "Wharf" written in English, and "Cannery Wharf" in Arabic.[234] KSM told interrogators it was part of the "Heathrow program" to target Canary Wharf in London as well, a target that had not been previously discussed by other detainees.[235]

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[229] SSCI Study, Volume II, April 1, 2014, pp. 1000-1062.
[230] *See supra* pp. 37-41.
[231] SSCI Study, Volume II, April 1, 2014, pp. 976-78.
[232] *See* SSCI Study, Volume II, April 1, 2014, p. 983.
[233] SSCI Study, Volume II, p. 983 n.4387.
[234] CIA, WASHINGTON DC [redacted] CIA, [redacted] 10787, March 13, 2003, p. 3.
[235] *See* CIA, [redacted] 10787, March 13, 2003, p. 3.

~~(TS~~[redacted]~~NF)~~ After the detention in April 29, 2003, of Khallad bin Attash and Ammar al-Baluchi, debriefers used the reporting from KSM and bin al-Shibh to confront them. In a document explaining the value of detainee reporting provided to the Department of Justice, CIA explained:

> Khallad admitted to having been involved in the plot and revealed that he directed group leader Hazim al-Sha'ir to begin locating pilots who could hijack planes and crash them into the airport. Khallad said he and operative Abu Talha al-Pakistani considered [redacted] countries as possible launch sites for the hijacking attempts and that they narrowed the options to the [redacted] Khallad's statements provided leverage in debriefings of KSM. KSM fleshed out the status of the operation, including identifying an additional target in the United Kingdom, Canary Wharf.[236]

(U) In the years that followed the initial arrest of Ramzi bin al-Shibh, CIA officers continued to unravel the details of this plotting and provided information that helped lead to the detention and questioning of several other individuals involved in the plot.[237] In light of the information cited above, the Study's assertion that the CIA interrogation program played "no role" in the disruption of this plotting makes little sense, especially when the Study's own 62-page chart identifying the intelligence on the Heathrow plot devotes most of the pages to information from detainees in CIA's program or to Ramzi bin al-Shibh, who was captured because of CIA detainee information.[238]

(U) *The Capture of Hambali*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"A review of CIA operational cables and other records found that information obtained from KSM during or after the use of the CIA's enhanced interrogation techniques played no role in the capture of Hambali."[239]**

Fact: ~~(TS~~[redacted]~~NF)~~ **CIA documents show that the interrogation of KSM and al-Qa'ida operative Zubair, during and after the use of enhanced interrogation techniques on both individuals, played a key role in the capture of Hambali.**

~~(TS~~[redacted]~~NF)~~ The Study's claim that the enhanced interrogation of KSM played "no role" in the capture of Hambali is not accurate, because two detainees subjected to enhanced interrogation techniques, KSM and Mohd Farik bin Amin, a senior member of Jemaah Islamiya (JI) and more commonly known as "Zubair,[240] provided significant information that helped lead to the capture of Hambali.

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[236] CIA, *Briefing Notes on the Value of Detainee Reporting*, April 8, 2005, 10:47am, p. 4.

[237] *See* SSCI Study, Volume II, April 1, 2014, pp. 1000-1062.

[238] *See* SSCI Study, Volume II, April 1, 2014, pp. 1000-1062.

[239] SSCI Study, Executive Summary, December 3, 2014, p. 305.

[240] The Study acknowledges that Zubair was immediately subjected to CIA enhanced interrogation techniques upon being transferred into CIA custody on June[redacted]2003. *See* SSCI Study, Executive Summary, December 3, 2014, p. 309. It attempts to downplay this fact by noting that: (1) "CIA records indicate that Thai authorities were unilaterally following investigative leads related to Hambali and Zubair" and that "[i]t is unknown what specific investigative steps were taken by Thai authorities (or the CIA) between early June 2003 and July 16, 2003, to

~~(TS~~[redacted]~~NF)~~ The claim that the enhanced interrogation of KSM played "no role" in the capture of Hambali ignores the fact that KSM provided the crucial piece of information permitting the CIA to recognize the significance of, and act upon, previously known connections that would ultimately lead to Hambali's capture. The Study correctly points out that on March 6, 2003, Majid Khan told foreign government [redacted] interrogators about his travel to Bangkok in December 2002 and provision of $50,000 to an individual named "Zubair" at the behest of al-Qa'ida.[241] While the Study would like the reader to infer that Majid Khan provided a sufficient connection to Hambali, the Study ignores the fact that Khan never mentioned that the money was destined for Hambali. Moreover, the Study excludes the CIA's answer to the following question for the record: "Was there enough other information linking Zubair and Hambali?" The CIA's answer states:

> No. We assess, and believe the documentary record indicates that otherwise available intelligence was not sufficient to enable officers at the time to conclude Zubair was a targeting inroad to Hambali. A targeting study on Hambali in the late December timeframe, for example, lists a number of potential inroads but not Zubair. A look at the contemporaneous records as well as a plot summary from years later provide no evidence that Zubair played a role in the Bali Bombings.[242]

While Majid Khan's information was still an important piece of the puzzle, it is clear that something more was needed to help locate Hambali. That "something more" would come from KSM several days later.

~~(TS~~[redacted]~~NF)~~ KSM had been rendered into CIA custody on March [redacted] 2003, and immediately subjected to enhanced interrogation.[243] On March 11, 2003, KSM admitted to providing Hambali with $50,000 to conduct a terrorist attack in "approximately November 2002." KSM reported, however, that the money was "necessary materials" for a Hambali operation that was approaching "zero hour," information that created a sense of urgency for the CIA to uncover more about Hambali's location.[244] During this interrogation, KSM made no reference to Majid Khan or Zubair.[245] On March 13, 2003, CIA [redacted] sent a

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investigate [BUSINESS Q] [redacted] [redacted] and (2) the CIA has never represented "to policymakers that the information obtained from Zubair after the use of the CIA's enhanced interrogation techniques led to Hambali's capture." *See* SSCI Study, Executive Summary, December 3, 2014, pp. 309, n.1737. Although we might not know what specific "unilateral" steps were taken by the Thai authorities related to [redacted], if any, CIA records provide a good description of the information provided by Zubair after the use of enhanced interrogation techniques and the subsequent steps taken by the CIA, including [redacted], to track down and capture Hambali. The absence of a CIA representation about Zubair does not invalidate the assertion that the information he provided after being subjected to enhanced interrogation techniques may have helped lead to the capture of Hambali, especially since this assertion is supported by the CIA documentary record.

[241] SSCI Study, Executive Summary, December 3, 2014, pp. 307-308.

[242] CIA Response to SSCI Request for Information, October 25, 2013, p. 4 (DTS 2013-3152). This answer contradicts the assertion by the Study that "[b]y this time, the CIA had significant information—prior to KSM's capture—indicating that a 'Zubair' played a central supporting role in the JI, was affiliated with al-Qa'ida figures like KSM, had expertise in [redacted] in Southeast Asia, and was suspected of playing a role in Hambali's October 12, 2002, Bali bombings." SSCI Study, Executive Summary, December 3, 2014, p. 306-307.

[243] See CIA, [CIA CABLE] 34491, March 5, 2003, pp. 1-3.

[244] CIA, [redacted] 10755, March 11, 2003.

[245] *See* CIA, [redacted] 10755, March 11, 2003, pp. 1-3.

cable saying that in light of KSM's information that he arranged to send $50,000 to Hambali in November 2002 to procure materials for an operation that was approaching "zero hour," "we view [the information] from Majid Khan on his trip to Bangkok for an alleged money transfer between 26-29 December with ever greater concern."[246] Moreover, the same cable makes clear that at the time of KSM's reporting, the CIA did not know whether the information from KSM and Majid Khan were about the same transaction. The cable says, "KSM's information and Majid's 'story' may be unrelated, but it appears too premature to judge at this juncture, and we must assume they possibly are until additional facts are learned."[247]

~~(TS~~[redacted]~~NF)~~ On March 17, 2003, KSM was questioned about the Majid Khan network. KSM positively identified a picture of Majid Khan as "Majid aka Yusif, the al-Qa'ida courier" KSM used to deliver the $50,000 for the next big Hambali operation, through "Hambali representatives in Thailand."[248] Significantly, KSM said that Khan had not been informed that the money was ultimately for Hambali and that KSM did not know who Hambali's intermediary was.[249] Days later, CIA officers still seemed to be trying to understand the connection between the KSM and the Majid Khan reporting. According to a March 20, 2003, cable, KSM's reporting that he used Majid Khan as a courier to transport al-Qa'ida funds to Hambali, "appears to confirm station [sic] earlier concerns that the $50,000 transfer involving KSM and Hambali may be one in the same with the $50,000 al-Qa'ida transfer facilitated by Khan.[250] Questioned again on March 22, 2003, Khan acknowledged that his trip to Thailand to deliver the $50,000 was at KSM's request.[251]

(U) While it would be difficult to know conclusively without talking to the analysts involved, CIA documents indicate it was the combination of reporting from KSM and Majid Khan that led to the efforts to find Hambali through Zubair. A CIA summary of Hambali's capture timeline states, while "numerous sources had placed Hambali in various Southeast Asian countries, it was captured al-Qa'ida leader KSM who put [redacted] on Hambali's trail"—contradicting the Study's claim that the KSM interrogation played "no role."[252]

~~(TS~~[redacted]~~NF)~~ On June 8, 2003, Zubair was detained by the Government of Thailand. [redacted], Zubair reported on [redacted]and corroborated reporting on Business Q.[253] On June [redacted]2003, Zubair was transferred into CIA custody and was immediately subjected to enhanced interrogation techniques.[254] Zubair told his interrogators about [redacted].[255] Zubair also explained how he [redacted].[256] This information was consistent with the information he had provided [redacted]

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[246] CIA, CIA CABLE, 81697, [redacted]
[247] *See* CIA, CIA CABLE, 81697, [redacted]
[248] CIA, [redacted] 10865, March 17, 2003, p. 3.
[249] *See* CIA, [redacted] 10865, March 17, 2003, p. 3.
[250] CIA, CIA CABLE 81990, March 20, 2003, p. 2.
[251] *See* CIA, CIA CABLE 13890, [redacted]
[252] CIA, *Hambali Capture/Detention Timeline*, no date, p. 6.
[253] *See* CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 19.
[254] *See* CIA [CIA CABLE] 40568, [redacted]
[255] *See* CIA, *Hambali Capture/Detention Timeline*, no date, p. 7; CIA, [CIA CABLE] 40915 [redacted] [redacted] CIA, [CIA CABLE] 41017, [redacted]

~~(TS~~[redacted]~~NF)~~ [redacted] the CIA planned an operation to find Hambali by watching [redacted] and waiting for Hambali's facilitators [redacted] It appears that Zubair provided key information about these Hambali facilitators after being subjected to the CIA's enhanced interrogation techniques. Specifically, CIA documents show that analysts assessed that it would be "Zubair cohort and former roommate Lilie" [redacted] because "per the Zubair debriefings, Lilie is now [redacted] and "finding Lilie, therefore, may be tantamount to finding Hambali."[258] [redacted] Hambali associate Amer, who actually [redacted] was tracked and Zubair identified a picture of him and speculated that "Lilie likely tasked [Amer] to handle [redacted] thus following Amer would likely lead to finding Lilie."[259] Amer was arrested on August 11, 2003, and cooperated in locating Lilie hours later.[260] Lilie was found to have a key fob in his possession imprinted with an address, which Lilie said was the address of two apartments he used for Hambali's activities, one of which was Hambali's residence.[261] Hambali was captured at the address found on the key fob several hours later.[262] It appears that Zubair's cooperation after being subjected to enhanced interrogation techniques played a significant role in the capture of Hambali through Amer and Lilie.

(U) *The Thwarting of the Second Wave Plots and Discovery of the Al-Ghuraba Group*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"A review of CIA operational cables and other documents found that the CIA's enhanced interrogation techniques played no role in the 'discovery' or thwarting of either 'Second Wave' plot. Likewise, records indicate that the CIA's enhanced interrogation techniques played no role in the 'discovery' of a 17-member 'cell tasked with executing the 'Second Wave.'"'[263]**

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[256] See CIA, *Hambali Capture/Detention Timeline*, no date, p. 7; CIA, [CIA CABLE] 40915 [redacted] [redacted]

[257] *See* CIA, *Hambali Capture/Detention Timeline*, no date, p. 7-8; CIA, ALEC [redacted]

[258] CIA, *Hambali Capture/Detention Timeline*, no date, p. 2.

[259] CIA, *Hambali Capture/Detention Timeline*, no date, p. 5.

[260] CIA, *Hambali Capture/Detention Timeline*, no date, p. 5.

[261] CIA, *Hambali Capture/Detention Timeline*, no date, p. 6.

[262] CIA, *Hambali Capture/Detention Timeline*, no date, p. 5.

[263] SSCI Study, Executive Summary, December 3, 2014, p. 251. This claim has been modified from the version that appeared in the report that was approved by the Committee at the end of the 112th Congress. For example, it no longer claims that the CIA's interrogation program, excluding the use of enhanced interrogation techniques, did not play a role in the thwarting of the al-Ghuraba Group. It also substitutes the words "discovery *or* thwarting" in place of the original "identification *and* disruption." (emphasis added).

Fact: ~~(TS~~[redacted]~~NF)~~ **The CIA interrogation program played a key role in disrupting the "Second Wave" plot and led to the capture of the 17-member al-Ghuraba group.**

~~(TS~~[redacted]~~NF)~~ The Study asserts that because Hambali's brother, Gun Gun Ruswan Gunawan, first identified a group of 17 Malaysian and Indonesian Jemaah Islamiya (JI) affiliated students in Karachi, "the use of the CIA's enhanced interrogation techniques against Hambali did not result in the 'discovery' of 'the Ghuraba Cell' that was 'tasked with executing the 'Second Wave' plotting.'"[264] While Gunawan did identify the group of JI students in Karachi, the Study ignores that KSM, who had also been subjected to the CIA's enhanced interrogation techniques, provided information months earlier on this same group of JI students and their location in Karachi—information that had helped lead to the capture of Gunawan himself. The Study also ignores information provided by other detainees in CIA's interrogation program.

~~(TS~~[redacted]~~NF)~~ In April 2003, KSM provided information about Gunawan's role in Karachi as a communications conduit between Hambali and al-Qa'ida and reported that he was living in the dormitory where he was enrolled at Abu Bakr-Sadeeq University.[265] KSM also drew a map with the location of a house he called "Colony Gate" where he met Gunawan, where he said a group of JI students would meet.[266] According to CIA information, while the CIA was already aware of Gunawan, "KSM's identification of his role as Hambali's potential successor prioritized his capture. Information from multiple detainees, including KSM, narrowed down [Gunawan's] location and enabled his capture in September 2003."[267] This information was excluded from the Study. Hambali provided very similar information after his capture in August 2003 [redacted].[268]

~~(TS~~[redacted]~~NF)~~ On August 20, 2003, CIA headquarters provided information on Gunawan [redacted] "which solidly ties Rusman Gunawan to al-Qa'ida and al-Qa'ida's terrorist attacks" [redacted][269] The information provided was largely from interrogations of KSM, including information about Gunawan working as a communications conduit for Hambali and al-Qa'ida, his location in Karachi, a description of Gunawan, but also provided information from another detainee in CIA custody, Ammar al-Baluchi.[270] Gunawan was arrested on [redacted], at the Abu Bakr Madrassa, locational information first provided by KSM, along with most of JI student group.[271]

~~(TS~~[redacted]~~NF)~~ After Gunawan's arrest he was caught trying to send a coded message which he admitted was intended to warn the group of JI-affiliated students about his arrest.[272] [redacted] participating in the interrogation recognized Gunawan's information about this group of mostly Malaysian students as similar to intelligence reporting provided previously by KSM that he was planning to recruit Malaysians in a "next wave of attacks."[273] The officers asked that Hambali be questioned about the reporting.[274]

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[264] SSCI Study, Executive Summary, December 3, 2014, pp. 255-256.
[265] *See* CIA, [redacted] 11192, April 8, 2003, p. 3.
[266] See CIA, [redacted] 11212, April 11, 2003, p. 2.
[267] CIA, Detainee Reporting Pivotal for the War Against Al-Qa'ida, June 1, 2005, p. 2 (DTS 2009-1387).
[268] *See* CIA, CIA CABLE 87551, August 15, 2003, pp. 4-5.
[269] CIA, ALEC [redacted]
[270] CIA, ALEC [redacted]
[271] *See* CIA, CIA CABLE 15252, [redacted]

~~(TS~~[redacted]~~NF)~~ During a CIA interrogation of Hambali days later, Hambali, now in CIA custody and undergoing enhanced interrogation, provided more information about the group, identifying them as the "al-Ghuraba" group and describing how they were set up by Hambali and sent to Karachi because of its "proximity to Afghanistan and the availability of military-style training facilities there."[275] He said the Program was designed to "give a select few the opportunity for military-style training to prepare them for jihad" and identified two who were ready for operations.[276] Hambali provided information about the identities and backgrounds of several of the al-Ghuraba group members and described conversations he had with KSM about possible future attacks on the United States.[277] In a subsequent interrogation, Hambali said the group was not yet ready for operations, but may be in 2003-2004 (it was already late 2003 when he provided this information) and he named individuals who were being groomed as suicide and other operatives.[278]

~~(TS~~[redacted]~~NF)~~ [redacted] arrested the members of the al-Ghuraba group during raids on [redacted]. A cable describing the arrests said, "[W]e captured this cell based on the debriefings of captured senior al-Qa'ida operatives, who stated that some members of this cell were to be part of senior al-Qa[']ida leader Khalid Shaykh Muhammad (KSM)['s] [']second wave['] operation to attack the United States using the same modus operandi as was used in the September 11, 2001 attacks."[279]

~~(TS~~[redacted]~~NF~~) In a seeming effort to suggest CIA's assessment of the threat posed by the al-Ghuraba group had diminished over time, the Study identified an October 27, 2006, CIA cable that stated, "[A]ll of the members of the former al-Ghuraba cell have now been released."[280] It also cited an April 18, 2008, CIA intelligence report focusing on the Jemaah Islamiya and referencing the al-Ghuraba group that makes no reference to the group serving as potential operatives for KSM's 'Second Wave' plotting."[281]

~~(TS/~~[redacted]~~NF)~~ These statements are misleading in several ways. The April 18, 2008 intelligence report was about Jemaah Islamiya in Pakistan, not the al-Ghuraba group, and provided only a minor description of the "al-Ghuraba cell in Karachi," but did mention that its leader was in direct contact with Hambali and "al-Qa'ida external operations chief Khalid

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[272] *See* CIA, CIA CABLE 15359, [redacted]
[273] CIA, CIA CABLE 15359, [redacted]
[274] *See* CIA, CIA CABLE 15359, [redacted]
[275] CIA, [CIA CABLE] 45915, September 14, 2003, p. 2.
[276] CIA, [CIA CABLE] 45915, September 14, 2003, p. 2.
[277] *See* CIA, [CIA CABLE] 45915, September 14, 2003, p. 2.
[278] CIA, [CIA CABLE] 45953, September 15, 2003, p. 3.
[279] CIA, CIA CABLE 52981, [redacted]
[280] CIA, CIA CABLE 131396, October 27, 2006, p. 2.
[281] *See* CIA, *Jemaah Islamiya: Counterterrorism Scrutiny Limiting Extremist Agenda in Pakistan*, April 18, 2008.

Shaykh Muhammad."[282] The Study omitted a report focused on Jemaah Islamiya's al-Ghuraba group published five months later that said "members of the cell had also been identified by Khalid Shaykh Muhammad, the mastermind of the attacks of 11 September 2001, and senior al-Qa'ida and JI operative Hambali as candidates for post-11 September attacks against the U.S. Homeland," including for "second wave suicide hijacking operations in the Unites States and Europe."[283] Far from suggesting the CIA was unconcerned about the al-Ghuraba group, this report devoted 20 pages to describing the threat from its members including their "jihad activities" and the caution that "as this group of radicalized militants reconnects and mingles with other young Southeast Asian Muslims, it poses a revived threat to US and Western interests."[284] [redacted]

(U) *Critical Intelligence Alerting the CIA to Jaffar al-Tayyar*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"CIA representations [about detainee reporting on Jaffar al-Tayyar] also omitted key contextual facts, including that . . . (2) CIA detainee Abu Zubaydah provided a description and information on a KSM associate named Jaffar al-Tayyar to FBI Special Agents in May 2002, prior to being subjected to the CIA's enhanced interrogation techniques . . . and (5) CIA records indicate that KSM did not know al-Tayyar's true name and that it was Jose Padilla—in military custody and being questioned by the FBI—who provided al-Tayyar's true name as Adnan el-Shukrijumah."**[286]

Fact: ~~(TS~~[redacted]~~NF)~~ **Abu Zubaydah provided a description of and information about Jaffar al-Tayyar to FBI special agents in May 2002 *after* being subjected to enhanced interrogation between April 15, 2002 and April 21, 2002. Although KSM did not know al-Tayyar's true name, he did report that Padilla might know al-Tayyar's true name. Padilla subsequently confirmed Jaffar's true name as Adnan El Shukrijumah.**

~~(TS~~[redacted]~~NF)~~ On May 20, 2002, while in CIA custody, Abu Zubaydah provided information on an associate of KSM by the name of Abu Jaffar al-Thayer. Abu Zubaydah provided a detailed description of Abu Jaffar al-Thayer, including that he spoke English well and may have studied in the United States.[287] The Study incorrectly claims that this May 20, 2002, interrogation took place prior to the initiation of the CIA's enhanced interrogation techniques.[288] Abu Zubaydah had already been subjected to an extended period of sleep deprivation and other enhanced interrogation techniques during his interrogation between April 15, 2002 and April 21, 2002, about one month *prior* to his May 20 interrogation.[289]

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[282] CIA, *Jemaah Islamiya: Counterterrorism Scrutiny Limiting Extremist Agenda in Pakistan*, April 18, 2008, p. 1.

[283] CIA, Southeast Asia: Jemaah Islamiya's Al-Ghuraba Cell Coalescing, September 17, 2008, pp. 1 and 2.

[284] CIA, Southeast Asia: Jemaah Islamiya's Al-Ghuraba Cell Coalescing, September 17, 2008, pp. 1-2.

[285] CIA, Southeast Asia: Jemaah Islamiya's Al-Ghuraba Cell Coalescing, September 17, 2008, p. 2.

[286] SSCI Study, Executive Summary, December 3, 2014, pp. 358-359.

[287] *See* FBI draft report of the interrogation of Abu Zubaydah, May 20, 2002, 5:25 p.m. to 8:40 p.m., p 3.

[288] *See* SSCI Study, Executive Summary, December 3, 2014, p. 362.

[289] *See supra*, pp. 33-36.

~~(TS~~[redacted]~~NF)~~ The Study also cites as a key contextual fact omitted from CIA representations that KSM did not know al-Tayyar's true name, and it was Jose Padilla, in military custody and being questioned by the FBI, who provided al-Tayyar's true name as Adnan el-Shukrijumah.[290] However, this omission was rendered moot because, as the Study itself notes a few pages later,[291] the "FBI began participating in the military debriefings [of Padilla] in March 2003, *after KSM reported Padilla might know the true name of a US-bound al-Qa'ida operative known at the time only as Jaffar al-Tayyar.* Padilla subsequently confirmed Jaffar's true name as Adnan El Shukrijumah."[292]

(U) *The Identification and Arrest of Saleh al-Marri*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **The Study correctly asserts, "[t]he CIA represented to the CIA Office of Inspector General that 'as a result of the lawful use of EITs,' KSM 'provided information that helped lead t the arrests of terrorists including . . . Saleh Almari, a sleeper operative in New York.'"** [293]

Fact: ~~(TS~~[redacted]~~NF)~~ **KSM provided valuable intelligence that helped to clarify Saleh al-Marri's role in al-Qa'ida operations and played a significant role in al-Marri's prosecution.**

~~(TS~~[redacted]~~NF)~~ The Study cites an interview between the OIG and the Deputy Chief of the Counterterrorist Center, in which the deputy chief claims that information from KSM helped lead to the arrest of al-Marri.[294] As the Study makes clear, al-Marri was not arrested based on information from KSM, and could not have been, because al-Marri was arrested in December 2001, before the detention of KSM in March 2003. Two days after the interview with the IG, the deputy chief wrote in an email that al-Marri "had been detained on a material witness warrant based on information linking him to the 9/11 financier Hasawi."[295] The Study correctly notes that this inaccuracy appears in the final version of the OIG's May 2004 Special Review[296], as referenced in an Office of Legal Counsel memorandum analyzing the legality of the CIA's enhanced interrogation techniques.[297] In its response to the Study, the CIA concedes that the agency erred in describing detainee reporting as contributing to al-Marri's arrest. However, the agency stresses that KSM did provide valuable intelligence on al-Marri—intelligence that played a significant role in al-Marri's prosecution.[298]

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[290] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 359.
[291] *See* SSCI Study, Executive Summary, December 3, 2014, p. 365.
[292] *See* CIA, *Briefing Notes on the Value of Detainee Reporting*, April 15, 2005, p. 3 (emphasis added); *See also CIA*, ALEC [redacted] March 21, 2003, p. 6 ("Our service has developed new information, based on leads from detained al-Qa'ida operations chief Khalid Shaykh Muhammad (KSM), that al-Qa'ida operative Jafar al-Tayyar's true name is Adnan Shukri Jumah and he could be involved in an imminent suicide attack in the United States").
[293] SSCI Study, Executive Summary, December 3, 2014, p. 366.
[294] SSCI Study, Executive Summary, December 3, 2014, p. 366 n.2064.
[295] Email from: [redacted]; to: [redacted] et al.; subject: value of detainees; date: July 18, 2003, at 2:30 PM.
[296] *See* CIA Office of Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003), May 7, 2004, p. 87 (DTS 2004-2710).*
[297] *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, May 30, 2005, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of high Value Al Qaeda Detainees, p.9 (DTS 2009-1810, Tab 11).

(~~TS~~[redacted]~~NF~~) The Study's focus on this factual error is out of proportion with its significance. The IG's Special Review section on effectiveness contains approximately six pages of discussion, including numerous success stories attributed to intelligence collected from detainees.[299] Incorrectly characterizing the manner in which detainee intelligence was valuable—arrest versus prosecution—for one item in a list of terrorists identified, captured, and prosecuted does not diminish the overall value that detainee intelligence provided in helping to identify, capture, and prosecute terrorists.

(~~TS~~[redacted]~~NF~~) The Study also notes that the CIA and the FBI had information about al-Marri prior to KSM's interrogation, in an apparent attempt to downplay the importance of the information obtained from KSM.[300] It was KSM who identified a photograph of al-Marri and described him as an al-Qa'ida sleeper operative sent to the United States shortly before 9/11. KSM said his plan was for al-Marri, who "had the perfect built-in cover for travel to the United States as a student pursuing his advanced degree in computer studies at a university near New York," was to serve as al-Qa'ida's point of contact to settle other operatives in the United States for follow-on attacks after 9/11.[301] KSM also said that al-Marri trained at the al-Faruq camp and had poisons training and said al-Marri offered himself as a martyr to Bin Ladin.[302] Prior to the information from KSM, al-Marri was charged with credit card fraud and false statements. After the information from KSM, al-Marri was designated as an enemy combatant. In 2009, after being transferred to federal court, al-Marri pled guilty to one count of conspiracy to provide material support to al-Qa'ida. In his plea, he admitted that he attended terrorist training camps and met with KSM to offer his services to al-Qa'ida, who told him to travel to the United States before 9/11 and await instructs—*all information initially provided by KSM*.

(U) *The Arrest and Prosecution of Iyman Faris*

Study Claim: **(U) "Over a period of years, the CIA provided the 'identification,' 'arrest,' 'capture,' 'investigation,' and 'prosecution' of Iyman Faris as evidence for the effectiveness of the CIA's enhanced interrogation techniques. These representations were inaccurate."[303]**

Fact: **(U) CIA, FBI, and Department of Justice documents show that information obtained from KSM after he was waterboarded led directly to Faris's arrest and was key in his prosecution.**

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[298] See CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 35.
[299] *See* CIA Office of Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003), May 7, 2004*, pp. 85-91 (DTS 2004-2710).
[300] See SSCI Study, Executive Summary, December 3, 2014, pp. 367-368.
[301] CIA, WASHINGTON DC [redacted]
[302] *See* CIA, CIA WASHINGTON DC [redacted]
[303] SSCI Study, Executive Summary, December 3, 2014, p. 276.

(U) The Study correctly points out that CIA statements implying that detainee information had led to the "identification" or "investigation" of Iyman Faris were inaccurate. However, contrary to the Study's claims, the CIA representations that information obtained from KSM after he was subjected to enhanced interrogation techniques directly led to the arrest and prosecution of Iyman Faris were accurate.

~~(S//OC/NF)~~ The CIA has admitted that, in a few cases, it incorrectly stated or implied that KSM's information led to the investigation of Iyman Faris when it should have stated that KSM's reporting informed and focused the investigation.[304] The CIA's mistake is somewhat understandable, given that the CIA only began to focus on Iyman Faris in March 2003 and was not aware that the FBI had opened and closed a preliminary investigation on Faris back in 2001. In essence, Faris was a new investigative target to the CIA in March 2003.[305] Regardless, the CIA's representation concerning the identification and initial investigation of Faris is much less important than the details that led to his arrest and prosecution.

(TS[redacted]FISA/NF) On March 5, 2003, Majid Khan, an al-Qa'ida operative directly subordinate to KSM, was taken into custody by Pakistani authorities.[306] That same day, the FBI's authorized electronic surveillance of Majid Khan's residence in Maryland indicated [redacted], Majid Kahn's [redacted], made a suspicious call to an individual, later confirmed to be Iyman Faris. They spoke about the possible arrest of Majid Khan and [redacted]'s suspicions that he was under FBI surveillance. [redacted] asked Faris whether he had been approached or questioned and warned Faris not to contact anyone using his phone.[307] The FBI reopened its international terrorism investigation on Iyman Faris soon thereafter.[308]

~~(TS~~[redacted]~~NF)~~ On March 10, 2003, in response to a requirements cable from CIA Headquarters reporting that al-Qa'ida was targeting U.S. suspension bridges,[309] KSM stated that any such plans were "theoretical" and only "on paper." He also stated that no one was currently pursuing such a plot.[310]

~~(TS~~[redacted]~~NF)~~ On March 11, 2003, Majid Khan identified a photograph of Iyman Faris before he was in CIA custody. Among other details, Khan said that Faris was a 35-year old truck driver of Pakistani origin who was a "business partner of his [redacted]," [redacted].[311] The next day, Majid Khan described Faris as "an Islamic extremist."[312] On March 14, 2003, Majid Khan provided the following additional details on Faris: (1) Faris was a mujahedeen "during the Afghan/Soviet period"; (2) Faris was a close associate of Maqsood

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[304] CIA Study Response, *Case Studies (TAB C)*; June 27, 2013, p. 13.

[305] *See* CIA Study Response, *Case Studies (TAB C)*; June 27, 2013, p. 14.

[306] *See* CIA, CIA CABLE 13658, March 5, 2003, pp. 1-2.

[307] CIA, CIA CABLE [redacted], March 6, 2003, p. 4.

[308] SSCI Study, Executive Summary, December 3, 2014, p. 280; FBI information confirmed by the FBI on November 30, 2010, SSCI Study, Executive Summary, December 3, 2014, p. 280, n.1581.

[309] CIA, ALEC [redacted] March 7, 2003, p. 1.

[310] CIA, [redacted] 10752, March 10, 2003, p. 2; CIA, DIRECTOR [redacted] March 12, 2003, p. 5. *See also* [redacted]

[311] CIA, CIA CABLE 13758, [redacted]

[312] CIA, CIA CABLE 13765, [redacted]

Khan, a known al-Qa'ida associate in contact with senior al-Qa'ida members and Majid's uncle; and (3) Faris had contacted Majid Khan's family after the capture of KSM became public and requested that the family pass a message to Maqsood Khan regarding the status of KSM.[313]

(~~TS~~[redacted]~~NF~~) On March 16, 2003, when asked again about the targeting of U.S. suspension bridges, KSM repeated his earlier assertions, noting that, while Usama Bin Ladin officially endorsed attacks against suspension bridges in the United States, he "had no planned targets in the [United States] which were pending attack and that after 9/11 the [United States] had become too hard a target."[314] KSM never referenced Iyman Faris during his March 10 and March 16 interrogations. Thus far, none of the information collected by the U.S. Intelligence Community would have been sufficient to prosecute Iyman Faris on charges of material support to terrorism.

(~~TS~~[redacted]~~NF~~) On March 17 and 18, 2003, the CIA questioned KSM about Majid Khan's family and KSM stated that another Khan relative, whom he identified from a picture of Faris, was a "truck driver in Ohio."[315] On March 18, 2003, KSM told interrogators he tasked the truck driver to procure specialized machine tools that would be useful to al-Qaida in loosening the nuts and bolts of suspension bridges in the United States. KSM said he was informed by an intermediary that Faris could not find the tools.[316] This revelation would turn out to be a key piece of incriminating evidence against Iyman Faris.

(~~TS~~[redacted]~~NF~~) The Study excluded information found in CIA documents which shows that, immediately after obtaining information from KSM and Majid Khan regarding Faris, the CIA queried the FBI for "additional details" on Faris, "including a readout on his current activities and plans for FBI continued investigation."[317] The cable specifically noted that "KSM seems to have accurately identified" Faris from a photograph as the "truck driver in Ohio." On March 20, 2003, the FBI picked Faris up for questioning and conducted a consent search of his apartment, seizing his laptop. When our staff asked the FBI why Faris was picked up, they cited the cables from CIA.[318] The FBI investigators went into this interview armed with the information revealed by KSM and Majid Khan, which enabled them to explore Faris's ties with KSM and al-Qa'ida plotting in the United States.[319] The Study notes that when approached by law enforcement, Iyman Faris voluntarily provided information and self-incriminating statements.[320] This gives a false impression that the information provided by KSM was unnecessary to securing the arrest and prosecution of Faris by omitting the important context that the FBI questioned Faris armed with incriminating information obtained from KSM on March 17 and 18, 2003.[321]

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[313] CIA, CIA CABLE 13785, [redacted]

[314] CIA, [redacted] 10858, March 9, 2003, p. 2.

[315] CIA, [redacted] 10886, March 18, 2003, pp 5-6.

[316] CIA, [redacted] 10886, March 18, 2003, pp 5-6.

[317] CIA, [redacted], *Information from KSM on Majid Khan.*

[318] Phone call from the FBI responding to Staff questions from a document review, January 25, 2013.

[319] *See* CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 13; FBI WASH 040537Z, April 4, 2003, p. 2.

[320] SSCI Study, Executive Summary, December 3, 2014, pp. 283-284.

[321] SSCI Study, Executive Summary, December 3, 2014, pp. 281-282.

(U) There is further proof that the incriminating revelations obtained from KSM after he was subjected to enhanced interrogation techniques led directly to the successful arrest and prosecution of Iyman Faris—On May 1, 2003, Faris pled guilty to "casing a New York City bridge for al Qaeda, and researching and providing information to al Qaeda regarding the tools necessary for possible attacks on U.S. targets," *the exact terrorist activities described by KSM.*

(U) *The Arrest and Prosecution of Uzhair Paracha and the Arrest of Saifullah Paracha*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The CIA represented that information obtained through the use of the CIA's enhanced interrogation techniques produced otherwise unavailable intelligence that led to the identification and/or arrest of Uzhair Paracha and his father Saifullah Paracha (aka, Sayf al-Rahman Paracha). These CIA representations included inaccurate information and omitted significant material information, specifically a body [of] intelligence reporting—acquired prior to CIA detainee reporting—that linked the Parachas to al-Qa'ida-related terrorist activities."**[322]

Fact: ~~(TS~~[redacted]~~NF)~~ **Information obtained from KSM during his enhanced interrogation on March 25, 2003, about alleged explosives smuggling into the United States, attacks on U.S. gas stations, and related material support to al-Qa'ida, motivated the FBI to track down and arrest Uzhair Paracha in New York a few days later on March 31, 2003. The Intelligence Community continued its pursuit of Saifullah, who was later arrested [redacted] on July 6, 2003. Among other charges, Uzhair was successfully convicted on November 23, 2005, of providing material support to al-Qa'ida and sentenced to 30 years in prison. KSM's description of Uzhair's involvement in the gas station plots and his claim that Uzhair may have provided other logistical support for Majid's entry into the United States was consistent with the press release's description of some of the evidence used during Uzhair's trial.**

~~(TS~~[redacted]~~NF)~~ On March 25, 2003, while being subjected to enhanced interrogation techniques, KSM provided U.S. domestic threat information concerning Saifullah Paracha and his son, Uzhair Paracha. KSM stated that Saifullah Paracha was a Pakistani businessman in Karachi, who owned a textile business with a branch in New York City. KSM alleged that his nephew, Ammar al-Baluchi, and Majid Khan had discussed a plan with Saifullah to use his textile business to smuggle explosives into the United States. According to this plan, the explosives would be shipped in containers that Saifullah used to ship the clothes that he sold in the United States. KSM stated that Saifullah agreed to the plan, but he was unclear how much Uzhair Paracha knew about it.[323] KSM added that Majid Khan planned to rent a storage space in whatever area of United States he chose, not necessarily close to New York City, and that the explosives would be used in al-Qa'ida's campaign against economic targets in the United States.[324]

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[322] SSCI Study, Executive Summary, December 3, 2014, p. 352.

[323] CIA, DIRECTOR [redacted]

~~(TS~~[redacted]~~NF)~~ KSM was also aware that Ammar al-Baluchi and Majid Khan had approached Saifullah and Uzhair to help resettle Majid Khan in the United States, where Majid had plans *to blow up several gas stations*. KSM stated that Ammar was hoping that Paracha could sponsor Majid's entry into the United States, if necessary. KSM also told his interrogators that "*Uzhair may have provided other logistical support for Majid's entry into the United States*."[325] Finally, KSM noted that Saifullah owned a media company in Pakistan and had traveled to Kandahar, Afghanistan, in 1999 to meet with Usama Bin Ladin for the purpose of offering al-Qa'ida the services of his media company.[326]

~~(TS~~[redacted]~~NF)~~ Threat information related to the allegation of explosives smuggling motivated the FBI to begin searching in earnest for Saifullah and Uzhair Paracha. The next day, on March 26, 2003, the FBI's field division in Washington, DC requested the CIA to approve the following tearline based upon KSM's reporting:

> Subject: Sayf Al-Rahman Paracha's Possible Involvement in Plot to Smuggle Explosives to the United States. It has come to our attention that one Sayf al-Rahman Paracha, a Pakistani businessman and owner of an import-export textile business in Karachi, Pakistan, may be involved in a plan to smuggle explosives to the United States for al-Qa'ida terrorist related activities. There is a possibility that Mr. Paracha's son Uzhair may be involved as well. Our information indicates that Uzhair traveled from Pakistan to the U.S. circa 17 February 2003. We seek your assistance in providing any information you may have regarding these individuals, their activities, and personalities. Your cooperation and assistance in this matter is greatly appreciated.[327]

In the same cable request, the FBI noted that it had conducted routine records checks and that both Parachas [redacted].[328]

~~(TS~~[redacted]~~NF)~~ The FBI arrested Uzhair in New York on March 31, 2003. The CIA was able to develop an operation that lured Saifullah Paracha out of Pakistan, which resulted in his arrest [redacted] on July 6, 2003.[329] On November 23, 2005—after a two-week jury trial—Uzhair was convicted on all charges in the five-count indictment of providing material support to al-Qa'ida and sentenced to 30 years in prison.[330] The press release announcing the trial results stated,

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[324] CIA, DIRECTOR [redacted]

[325] CIA, DIRECTOR [redacted]

[326] CIA, DIRECTOR [redacted] During a subsequent interrogation, KSM provided additional incriminating information about Saifullah Paracha. The cable reports that "[i]n light of Paracha's past history of handling money for al-Qa'ida, [KSM] approached Paracha with approximately U.S. $260,000-275,000 in cash and asked him to hold it for al-Qa'ida. [KSM] told Paracha not to invest the money in any business ventures and instructed him to keep the money in a safe at his office." KSM had received these funds from Usama Bin Ladin. CIA, [redacted] 11123, April 3, 2003, p. 3.

[327] FBI, WASH 261909Z, March 26, 2003, pp. 2-3.

[328] FBI, WASH 261909Z, March 26, 2003, p. 2.

[329] CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 31.

> The evidence at trial proved that PARACHA, 26, agreed with his father, Saifullah Paracha, and two al Qaeda members, Majid Khan and Ammar Al-Baluchi, to provide support to al Qaeda by, among other things, *trying to help Khan obtain a travel document that would have allowed Khan to re-enter the United States to commit a terrorist act.* Statements from Khan admitted at trial revealed that, once inside the United States, *Khan intended to carry out an attack on gasoline stations.*[331]

The decision to conduct the "late night" interrogation session with KSM on March 25, 2003, was made after reviewing recent intelligence obtained from Majid Khan and Iyman Faris.[332] The March 22, 2003, interview of Majid Khan was conducted by [redacted].[333] The resulting cable from that interview explained the relationship between the Parachas and al-Qa'ida, specifically Majid Khan and Ammar al-Baluchi.[334] It also provided details explaining how Uzhair impersonated Majid Khan by using Majid's debit card and a phone conversation between Uzhair and Majid Khan related to Majid's bank account and "calls to the INS."[335] This information from the March 22, 2003, interrogation of Majid Khan was consistent with the charges described in Uzhair Paracha's indictment, although it did not include any reference to the gas station attacks mentioned by KSM.[336]

~~(TS~~[redacted]~~NF)~~ Based on these facts, we conclude that KSM's allegations of Saifullah Paracha's involvement in a plan to smuggle explosives into the United States motivated the FBI to track down and arrest Uzhair Paracha in New York just a few days later, on March 31, 2003. The CIA was able to develop an operation that lured Saifullah Paracha out of Pakistan, which resulted in his arrest in [redacted], on July 6, 2003. There appears to be a direct causal link between the information provided by KSM and the subsequent actions by the Intelligence Community that led to the arrests of Saifullah and Uzhair Paracha. Moreover, KSM's description of Uzhair's involvement in the gas station plots and his claim that Uzhair may have provided other logistical support for Majid's entry into the United States was consistent with the description of evidence used during Uzhair's trial that was included in the press release announcing the trial results.[337]

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[330] DOJ, United States Attorney, Southern District of New York, *Pakistani Man Convicted of Providing Material Support to Al Qaeda Sentenced to 30 Years in Federal Prison,* July 20, 2006, p.1.

[331] DOJ, United States Attorney, Southern District of New York, *Pakistani Man Convicted of Providing Material Support to Al Qaeda Sentenced to 30 Years in Federal Prison,* July 20, 2006, p. 2.

[332] CIA, [redacted] 10984, March 24, 2003, p. 2 ("Base decided to hold a late night session with KSM upon reviewing latest Karachi readout on [Majid Khan] debriefs [CIA CABLE 13890] and FBI intel report . . . from debriefings of . . . [Iyman Faris]").

[333] CIA, CIA CABLE 13890, [redacted]

[334] CIA, CIA CABLE 13890, [redacted]

[335] CIA, CIA CABLE 13890, [redacted]

[336] *Compare* CIA, CIA CABLE 13890, [redacted], *with* Indictment, *United States v. Uzair Paracha,* United States District Court, Southern District of New York. Our review of the initial cables related to the plan to attack gas stations in the United States revealed that on March 18, 2003, Majid Khan was the first to disclose KSM's interest in "operational procedures of U.S. gas stations and the tanker trucks that service them," but provided no real details about specific plans other than being later tasked by KSM to investigate the procedures for purchasing gas stations in Pakistan. CIA CIA CABLE 13816, March 18, 2003, p. 3. On March 18, 2003, KSM provided incriminating details about his conspiracy with Majid Khan to attack gas stations in the United States. *See* CIA, [redacted] 10886, March 18, 2003, pp. 2-4.

~~(TS~~[redacted]~~NF)~~ The Study asserts that KSM's allegations of explosives smuggling were inaccurate because Saifullah Paracha and others denied being involved in such a plot and at least one senior CIA counterterrorism official questioned the validity of the smuggling plot.[338] The fact that Saifullah Paracha and his alleged co-conspirators denied their involvement in an explosives smuggling plot is not persuasive. Also, we have no intention of countering the CIA official's speculative judgment about the alleged plot with further speculation of our own. Regardless of whether the allegations of explosives smuggling were true, the allegations alone were sufficient to trigger the immediate responsive actions by the FBI and CIA that helped lead to the capture of these two terrorists.

~~(TS~~[redacted]~~NF)~~ The Study also attempts to lessen the significance of the information provided by KSM by suggesting that the Intelligence Community had sufficient information prior to KSM's reporting to identify and arrest Saifullah and Uzhair Paracha. In support of this assertion, the Study identifies what it considers to be "significant material information" acquired by the Intelligence Community prior to any reporting from CIA detainees.[339] Quibbling about the omission of "significant material information,"—including previously obtained information about an individual named Paracha other than Uzhair and Saifullah or contained in un-disseminated FBI case files[340]—seems largely tangential to the fact that detainee information, including some information obtained after using enhanced interrogation techniques, helped lead to the successful arrests of both men and was consistent with evidence used in the successful prosecution of Uzhair Paracha.

(U) *Tactical Intelligence on Shkai, Pakistan*

~~(TS~~[redacted]~~NF)~~ The Study asserts that the "CIA representation that the use of the CIA's enhanced interrogation techniques produced *otherwise unavailable* tactical intelligence related to Shkai, Pakistan, was provided to senior policymakers and the Department of Justice between 2004 and 2009."[341] Here is the actual text of the CIA representation at issue:

> *Shkai, Pakistan:* The interrogation of Hassan Ghul provided *detailed* tactical intelligence showing that Shkai, Pakistan was a major Al-Qa'ida hub in the tribal areas. Through [the] use of [redacted] during the Ghul interrogation, we mapped out and pinpointed the residences of key AQ leaders in

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[337] *Compare* DOJ, United States Attorney, Southern District of New York, *Pakistani Man Convicted of Providing Material Support to Al Qaeda Sentenced to 30 Years in Federal Prison,* July 20, 2006, p.1 *with* CIA, DIRECTOR [redacted]

[338] SSCI Study, Executive Summary, December 3, 2014, p. 352.

[339] SSCI Study, Executive Summary, December 3, 2014, pp. 352-355.

[340] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 354-355; *see also,* CIA Study Response, *Case Studies,* June 27, 2013, pp. 31-32.

[341] SSCI Study, Executive Summary, December 3, 2014, p. 370 (emphasis added).

Shkai. This intelligence was provided [redacted][342]

This representation does not assert that the intelligence was "otherwise unavailable" tactical intelligence, but rather, "detailed" tactical intelligence. More important, while the Study's paraphrase of the representation is not accurate, the CIA's representation itself was factually accurate.

(TS[redacted]OC/NF) The CIA Response to the Study makes it clear that Ghul provided detailed tactical intelligence on Shkai, Pakistan, after he was subjected to enhanced interrogation techniques. Specifically, he sat down with [redacted] experts and pointed to specific locations where he had met some of the senior al-Qa'ida members who the CIA was trying to find.[343] Ghul also revealed his understanding about how Hamza Rabia, a then little-known al-Qa'ida operative, had taken over as the group's lead attack coordinator after the capture of KSM in 2003.[344] He used [redacted] to give more details about the "Bachelor House," the "Ida Khan Complex" and a separate compound used by a group of al-Qa'ida-aligned Uzbeks. He even described the group's evacuation plans in the event of an attack on Shkai.[345] During an interrogation on January 28, 2004, Hassan Ghul drew a detailed map of the locations of a training camp/safehouse near Shkai, provided route information to the site, provided a detailed sketch of the compound and specified the rooms where explosives were stored. Ghul was shown [redacted] the area and located the route [redacted].[346] He also identified nine al-Qa'ida members—including Hamza Rabia, Abu Faraj al-Libia, and Spin Ghul—who were located at the safehouse as of June 2003.[347]

~~(TS~~[redacted]~~NF)~~ Senior U.S. officials presented the CIA's analysis of Ghul's debriefings and other intelligence about Shkai [redacted].[348] As the Study notes, a July 2004 CIA report says that [redacted] "[a]l-Qaida's senior operatives who were in Shkai [redacted] remained in South Waziristan as of mid-June [2004]."[349] However, the CIA report also notes that [redacted]

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[342] CIA Memorandum for Steve Bradbury at Office of Legal Counsel, Department of Justice, dated March 2, 2005, from CIA attorney, [redacted] Legal Group, DCI Counterterrorist Center, subject "Effectiveness of the CIA Counterterrorist Interrogation Techniques" (emphasis added).

[343] CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 36; ALEC [redacted] February [redacted] 2004, pp. 5 and 11.

[344] CIA, CIA CABLE 20397, February [redacted] 2004, p. 5.

[345] CIA, CIA CABLE [redacted], February [redacted], 2004, pp. 10 and 12; CIA, CIA CABLE 1299, January [redacted], 2004, pp. 2-3.

[346] CIA, CIA CABLE [redacted], February [redacted], 2004, pp. 10 and 12; CIA, CIA CABLE 1299, January [redacted], 2004, pp. 2-3.

[347] CIA, CIA CABLE [redacted], February [redacted] 2004, pp. 10 and 12; CIA, CIA CABLE 1299, January [redacted] 2004, pp. 2-3.

[348] CIA, ALEC [redacted] February [redacted] 2004, pp. 1-2; CIA, CIA CABLE 67575, May 6, 2004, p. 1-2; CIA, CIA CABLE 66803, April 26, 2004, pp. 1-11.

[349] SSCI Study Response, Executive Summary, December 3, 2004, p. 378; CIA, DIRECTOR [redacted] CIA, *Al-Qaida's Waziristan Sanctuary Disrupted but Still Viable*, July 21, 2004, p. 1, (DTS 2004-3240).

[redacted]

~~(TS~~[redacted]~~NF)~~ This particular case study has been a bit of a "moving target" since it first appeared in the original Study approved by the Committee during the 112th Congress.[351] Its revised claims seek to undermine the significance of the information provided by Ghul after the use of the enhanced interrogation techniques. These revised claims basically assert that: (1) the "vast majority" of Ghul's information was provided prior to his being subjected to enhanced interrogation techniques; (2) the CIA's [redacted] assessed that this prior information was sufficient to press the Pakistani [redacted] and (3) Ghul's information confirmed earlier reporting that the Shkai Valley of Pakistan served as al-Qa'ida's command and control center after its exodus from Afghanistan in 2001.[352] These claims are little more than an effort to distract the reader from the previously referenced, significant tactical intelligence provided by Ghul after the use of enhanced interrogation techniques. Again, one of the problems with the Study's flawed analytical methodology is that it often turns a blind eye to information obtained after the use of enhanced interrogation techniques if it cannot readily undermine its significance, because such "inconvenient" facts disprove the Study's main conclusion that the CIA's use of enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees.

~~(TS~~[redacted]~~NF)~~ In a similar vein, the Study asserts that "CIA records do not indicate that information provided by Ghul during this period, or after, resulted in the identification or capture of any al-Qa'ida leaders."[353] In fact, prior to the use of enhanced interrogation techniques, Hassan Ghul speculated that Abu Ahmad al-Kuwaiti: (1) could be one of three people with Usama Bin Ladin; and (2) may have handled Bin Ladin's needs, including sending messages to his gatekeeper, Abu Faraj al-Libi. After the use of enhanced interrogation techniques, Hassan Ghul cooperated by telling his interrogators that Abu Ahmad specifically passed a letter from Bin Ladin to Abu Faraj in late 2003 and that Abu Ahmad had "disappeared" from Karachi, Pakistan, in 2002. This information was not only more concrete than Ghul's earlier speculations, but it corroborated information from another detainee, Ammar al Baluchi, that Abu Ahmad served as a courier for Bin Ladin.[354] While this information technically didn't result in the "identification" or "capture" of Bin Ladin, it most certainly played a crucial role in the U.S. Government's successful efforts to locate and neutralize Bin Ladin in his Abbottabad compound in Pakistan on May 2, 2011.

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[350] CIA, *Al-Qaida's Waziristan Sanctuary Disrupted but Still Viable*, July 21, 2004, p. 1, (DTS 2004-3240).

[351] *Compare* CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 36 (citing the original Study claims concerning the CIA's representation about Ghul's tactical intelligence on Shkai in the appendix to the Study's original findings and conclusions) *with* SSCI Study, Executive Summary, December 3, 2014, p. 368.

[352] SSCI Study, Executive Summary, December 3, 2014, p. 369.

[353] SSCI Study, Executive Summary, December 3, 2014, p. 376.

[354] CIA, DIRECTOR [redacted]

(U) *The Thwarting of the Camp Lemonier Plotting*

~~(TS~~[redacted]~~NF)~~ In a September 6, 2006 speech, President Bush highlighted the thwarting of a planned strike against Camp Lemonier in Djibouti as an example of the value of information obtained as a part of CIA's Detention and Interrogation Program. The core claim in this section of the Study is not only inaccurate; it was never made.

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The CIA represented that intelligence derived from the use of CIA's enhanced interrogation techniques thwarted plotting against the U.S. military base, Camp Lemonier, in Djibouti. These representations are inaccurate."**[355]

Fact: ~~(TS~~[redacted]~~NF)~~ **Representations about the thwarting of an attack against Camp Lemonier in Djibouti, specifically President Bush's 2006 comments that "Terrorists held in CIA custody have also provided information that helped stop a planned strike on U.S. Marines at Camp Lemonier in Djibouti," were accurate and have been mischaracterized by the Study.**[356]

~~(TS~~[redacted]~~NF)~~ In this section of the Executive Summary, the Study fundamentally mischaracterizes two representations attributed to President Bush and the CIA. The first representation, which comes from the President's September 6, 2006, speech, is attributed to the CIA by the Study because of the CIA's vetting of the speech. In his speech, the President stated, "*[t]errorists held in CIA custody* have also provided information that *helped stop a planned strike* on U.S. Marines at Camp Lemonier in Djibouti . . . ."[357] Contrary to the Study's assertions, the President did not attribute the thwarting of this plot exclusively to the use of enhanced interrogation techniques, but information from "[t]errorists held in CIA custody." In addition, the President never stated that the plot was disrupted exclusively because of information from detainees in CIA custody. The President was clear that information from detainees "helped" to stop the planned strike. This idea that detainee reporting builds on and contextualizes previous and subsequent reporting is repeated a few lines later in the speech, when the President makes clear, "[t]he information we get from these detainees is corroborated by intelligence . . . that we've received from other sources, and together this intelligence has helped us connect the dots and stop attacks before they occur."[358] This is another example of where the President and the CIA are pilloried by the Study for representations they actually never made.

~~(TS~~[redacted]~~NF)~~ The second example cited in the Study is pulled from a set of talking points drafted for use in an October 30, 2007, briefing to then-Chairman of the House

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[355] SSCI Study, Executive Summary, December 3, 2014, p. 336.

[356] President George W. Bush, *Trying Detainees; Address on the Creation of Military Commissions,* Washington, D.C., September 6, 2006.

[357] President George W. Bush, *Trying Detainees; Address on the Creation of Military Commissions,* Washington, D.C., September 6, 2006 (emphasis added).

[358] President George W. Bush, *Trying Detainees; Address on the Creation of Military Commissions,* Washington, D.C., September 6, 2006.

Defense Appropriations Subcommittee, former Congressman John Murtha. In the written talking points, the CIA states, "[A CIA detainee] informed us of an operation underway to attack the U.S. military at Camp Lemonier in Djibouti. We believe our understanding of this plot helped us prevent the attack."[359] Setting aside the question of whether these talking points were ever actually employed (which is virtually unanswerable, given the passing of Congressman Murtha in 1010 and the Study's failure to interview the relevant intelligence officers), this representation, like the President's 2006 speech, does not include a reference to enhanced interrogation techniques. Moreover, as was previously the case, the CIA does not claim that the attacks were thwarted solely because of detainee information. They clearly point to their "understanding of this plot," which was a mosaic based on many different sources of intelligence.

~~(TS~~[redacted]~~NF)~~ The President's claim that "[t]errorists held in CIA custody have also provided information that helped stop a planned strike on U.S. Marines at Camp Lemonier in Djibouti" was accurate.[360] The detention of two terrorists by the CIA, KSM and Guleed Hassan Ahmed, affected al-Qa'ida's ongoing plotting against Camp Lemonier. The March 3, 2003, arrest of KSM came days after a late-February meeting with Abu Yasir, al-Qa'ida's link to affiliated terrorist cells in Somalia and Kenya, and prevented KSM from attending a follow-on meeting, at which he was to discuss the provision of operational funds with al-Qa'ida leaders in East Africa, some of whom were plotting an attack against Camp Lemonier.[361] Guleed Hassan Ahmed, who conducted reconnaissance of Camp Lemonier for al-Qa'ida, provided information about the Camp Lemonier plot and al-Qa'ida's Somali support network.[362] The information Guleed provided, both prior to and after being transferred into CIA custody, combined with intelligence derived from other sources and methods, was central in driving CIA's targeting of al-Qa'ida proxies based in East Africa.[363] Although these events are not independently responsible for thwarting the plot against Camp Lemonier, they undoubtedly "helped" or contributed to the disruption of the plot.

~~(TS~~[redacted]~~NF)~~ Finally, the Study claims that plotting against Camp Lemonier "did not 'stop' because of information acquired from CIA detainee Guleed in 2004, but rather, continued well into 2007," implying that continued terrorist targeting of Camp Lemonier excludes the possibility a planned strike was thwarted.[364] This assertion undervalues Camp Lemonier's appeal as a terrorist target, and is willfully blind to the victory even a single obstructed terrorist plot represents. Camp Lemonier is the only major U.S. military base in sub-Saharan Africa, hosting approximately 1,600 military personnel.[365] It is also located within striking distance of, and an active threat to, al-Qa'ida operatives throughout the Horn of Africa. It stands to reason that Camp Lemonier exists as a target of sustained terrorist focus.

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[359] SSCI Study, Executive Summary, December 3, 2014, p. 338; *DCIA Meeting with Chairman Murtha re Rendition and Detention Programs*, October 30, 2007, p. 1.

[360] President George W. Bush, *Trying Detainees; Address on the Creation of Military Commissions*, Washington, D.C., September 6, 2006.

[361] CIA, DIRECTOR [redacted]; CIA, HEADQUARTERS [redacted]

[362] CIA, CIA [redacted] [redacted]

[363] CIA, HEADQUARTERS [redacted]

[364] SSCI Study, Executive Summary, December 3, 2014, p. 338.

[365] CIA, CIA CABLE 207044, May 22, 2003, p. 9.

(U) *CIA Detainees Subjected to EITs Validated CIA Sources*

Study Claim: **~~(TS~~[redacted]~~NF)~~ "[T]he CIA also represented that its enhanced interrogation techniques were necessary to validate CIA sources. The claim was based on one CIA detainee—Janat Gul—contradicting the reporting of one CIA asset."[366]**

Fact: **~~(TS~~[redacted]~~NF)~~ Contrary to the Study's claim, the CIA representations cited by the Study do not assert that enhanced interrogation techniques helped to validate sources. Rather, the representations only make reference to "detainee information" or detainee "reporting." Also contrary to the Study's claim, we found evidence in the documentary record where the CIA representations about Janat Gul also contained additional examples of source validation. Moreover, the three items of information that the Study asserts should have been included in the Janat Gul asset validation representations were not "critical" and their inclusion does not alter the fact that Gul's persistent contradiction of the asset's claims did help the CIA "validate" that particular asset.**

~~(TS~~[redacted]~~NF)~~ The Study complains that the CIA justified the use of enhanced interrogation techniques by repeatedly using the same Janat Gul example of detainee reporting to determine that one of its assets had fabricated information. The Study first provides the following representation made by CIA Director Hayden during one of our Committee hearings:

> Detainee information is a key tool for validating clandestine sources. In fact, in one case, the detainee's information proved to be the accurate story, and the clandestine source was confronted and subsequently admitted to embellishing or fabricating some or all of the details in his report.[367]

The Study also provides one other example of an asset validation justification:

> Pakistan-based facilitator *Janat Gul's most significant reporting* helped us validate a CIA asset who was providing information about the 2004 pre-election threat. The asset claimed that Gul had arranged a meeting between himself and al-Qa'ida's chief of finance, Shaykh Sa'id, a claim that Gul vehemently denied. Gul's reporting was later matched with information obtained from Sharif al-Masri and Abu Talha al-Pakistani, captured after Gul. With this reporting in hand, CIA

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[366] *See* SSCI Study, Executive Summary, December 3, 2014, p. 342.

[367] SSCI Study, Executive Summary, December 3, 2014, p. 342 (citing General Michal Hayden, Director, Central Intelligence Agency, *Classified Statement for the Record*, Senate Select Committee on Intelligence, April 12, 2007, p. 8 (DTS 2007-1563)).

> [redacted] the asset, who subsequently admitted to fabricating his reporting about the meeting.[368]

Contrary to the Study's claim here, the first observation that should be made about these representations is that they do not contain any reference to the use of "enhanced interrogation techniques." In the first representation, Director Hayden uses the words "detainee information." In the second, the briefing notes simply use the term "reporting."

~~(TS~~[redacted]~~NF)~~ Another part of the Study's claim is also factually inaccurate. The Study asserts that the CIA's representation "was based on ***one*** CIA detainee—Janat Gul . . . ."[369] During our review of the documentary record we found numerous copies of the "Briefing Notes on the Value of Detainee Reporting," that contained the exact representation cited by the Study above, although the version we selected did not place special emphasis on "Janat Gul's most significant reporting."[370] More important, the representations in the August 2005 version contain the following additional examples under the same heading of "Helping to Validate Other Sources":

> In other instances, detainee information has been useful in identifying clandestine assets who are providing good reporting. *For example*, Hassan Ghul's reporting on Shkai *helped us validate several assets* in the field who also told us that al-Qa'ida members had found safehaven at this location. . . .
>
> Sometimes *one detainee validates reporting from others.* [redacted] corroborated information from key [redacted] who were involved in facilitating the movement of al-Qa'ida personnel, money, and messages into and out of [redacted]. *For example*, [redacted] indicated that [redacted] was the link between al-Qa'ida and [redacted], and [redacted] *corroborated that fact* when he noted that [redacted] was the "go-between" for al-Qa'ida and [redacted].[371]

Ironically, the Study's omission of these additional examples of source validation from its own analysis deprives the reader of "significant context."

~~(TS~~[redacted]~~NF)~~ The Study seems to imply that the omission of certain "critical" contextual information from the CIA's representations about source validation somehow nullifies the Janat Gul example.[372] Our examination of the three items of contextual information cited by the Study leads us to conclude that the Janat Gul case remains illustrative of detainee information helping to determine that a CIA source had fabricated certain aspects of his reporting.

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[368] SSCI Study, Executive Summary, December 3, 2014, p. 343 (citing CIA, Briefing for Obama National Security Team - "Renditions, Detentions, and Interrogations (RDI)" including "Tab 7," named "RDG Copy- Briefing on RDI Program 09 Jan. 2009." (emphasis in original).

[369] SSCI Study, Executive Summary, December 4, 2014, p. 342 (emphasis added).

[370] CIA, *Briefing Notes on the Value of Detainee Reporting,* August 2005, p. 8. This document is attached as Appendix II, *see infra,* p. II-1.

[371] CIA, *Briefing Notes on the Value of Detainee Reporting,* August 2005, pp. 8-9 (emphasis added).

[372] SSCI Study, Executive Summary, December 4, 2014, p. 343.

~~(TS~~[redacted]~~NF)~~ First, the Study faults the CIA for failing to include in its representations that the asset's reporting about the 2004 pre-election threat was doubted by CIA officers prior to the use of enhanced interrogation techniques against Janat Gul.[373] This concern is easily dismissed because a review of the e-mail reveals that the concerns raised by the CIA officers were not about the credibility of the sources, but more about the possibility that al-Qa'ida might be using this threat information to test the sources who had provided the pre-election threat information. The email raising the concern specifically states, "this is not to say that either ASSET Y or [source name REDACTED] are wrong or that the AQ statement below[374] is anything more than disinformation."[375] The reply email stated that it was possible the sources were just hearing the same rumors, but recollected that when al-Qa'ida put out similar rumors in the summer of 2001, those turned out to be true.[376] These emails do not support any inference about early suspicions of the source's credibility nor do they dismiss the legitimacy of the threat information provided by the sources.

~~(TS~~[redacted]~~NF)~~ The Study criticizes the asset validation representations by the CIA because they did not acknowledge that the source's fabricated reporting was the reason that Janat Gul was subjected to the enhanced interrogation techniques.[377] There are two problems with this criticism. First, the CIA believed that the source's allegations about Janat Gul meeting with Shayk Sa'id, al-Qa'ida's chief of finance, were true when they began to use enhanced interrogation techniques against Gul between August 3, 2004, and August 10, 2004, and then again from August 21, 2004, to August 25, 2004.[378] The CIA source did not recant some of the underlying threat information pertaining to Gul until October [redacted] and [redacted], 2004, *more than two months after Gul's enhanced interrogation began and 15 days after his enhanced interrogation ended.* It is also important to understand that the source's information was not the only information that caused the CIA to believe that Gul was an al-Qa'ida facilitator with connections to multiple high value targets. The source's information was also not solely responsible for the request and authorization to subject Gul to enhanced interrogation techniques.[379] The CIA cable requesting interrogation authorities makes clear those authorities were being pursued to "collect critical threat, locational, and other high priority information."[380] This same communication cited a previous cable detailing CIA approval to detain Gul, in which Gul's apprehension was justified on grounds that he was "one of the highest level extremist facilitators remaining in Pakistan, and multiple source reporting indicates that he has connections to various HVTS."[381]

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[373] *See* SSCI Study, Executive Summary, December 4, 2014, pp. 343.

[374] The referenced statement was issued by al-Qa'ida on March 17, 2004, and asserted that al-Qa'ida would not operate any large-scale operation prior to the election.

[375] Email from: [redacted]; to: [redacted], [redacted], [REDACTED], [redacted], [redacted]; subject: could AQ be testing [ASSET Y] and [redacted][source name REDACTED]?; date: March [redacted], 2004, at 06:55 AM; Email from: [redacted]; to [redacted]; cc: [redacted], [redacted], [redacted], [REDACTED], [redacted]; subject: Re: could AQ be testing [ASSET Y] and [source name REDACTED]?; date: March [redacted], 2004, at 7:52:32 AM, p. 1 (footnote added). This document is attached as Appendix III, *see infra*, p. III-1.

[376] Email from: [redacted]; to: [redacted], [redacted], [REDACTED], [redacted], [redacted]; subject: could AQ be testing [ASSET Y] and [source name REDACTED]?; date: March [redacted], 2004, at 06:55 AM; Email from: [redacted]; to [redacted]; cc: [redacted], [redacted], [redacted], [REDACTED], [redacted]; subject: Re: could AQ be testing [ASSET Y] and [source name REDACTED]?; date: March [redacted], 2004, at 7:52:32 AM, p. 1 (footnote added). This email confirms that the sensitive source who subsequently admitted to fabricating information was not the only source providing information related to a possible pre-election terrorist threat. [redacted].

[377] SSCI Study, Executive Summary, December 4, 2014, p. 343.

[378] CIA, [redacted] 1512, [redacted] 2004, p. 2; CIA, [redacted] 1545, [redacted], 2004, p. 1; CIA, [redacted] 1603, [redacted] 2004, p. 3; and CIA, [redacted] 1632, [redacted] 2004, p. 2.

~~(TS~~[redacted]~~NF)~~ Second, the Study does not fully support its claim that the CIA source's representations about the pre-election threat were inaccurate.[382] Specifically, the cable reporting the fabrication by one of these sources in October 2004 clearly indicates that some of the source's pre-election threat information was considered to be "generally truthful." The Study states that the source "was deceptive in response to questions regarding . . . the pre-election threat."[383] This assertion is not entirely accurate. In fact, the cited cable indicated that the source [redacted] on the issue of the pre-election threat [redacted][384] Moreover, the assessment paragraph in the cited cable states: "Based on [the source's] seemingly genuine concern and constant return to the issue, COB believes that [the source] is being generally truthful about his discussions . . . on the pre-election threat."[385]

~~(TS~~[redacted]~~NF)~~ The Study's final piece of "critical" contextual information that was missing from the CIA representations on this issue was the failure of the CIA to disclose that it eventually concluded that Janat Gul was not a high-level al-Qa'ida figure and never had threat information.[386] This seems to miscast Janat Gul as a hapless victim of circumstance, when in fact he was a known terrorist facilitator. Beyond that, the question of whether every accusation made against Gul was proven or not, is fundamentally immaterial to the matter of his detainee reporting being used to validate—or, in this instance, invalidate—an intelligence source.

~~(TS~~[redacted]~~NF)~~ Our analysis has demonstrated that this claim suffers from multiple fatal defects: (1) the representations do not reference enhanced interrogation techniques; (2) representations in the documentary record were found to have additional examples of asset validation beyond the Janat Gul example; and (3) including any of the three problematic contextual items raised by the Study would not alter the fact that Janat Gul's persistent contradiction of the asset's claims did help the CIA "validate" that particular asset.

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[379] CIA, ALEC [redacted] [redacted]

[380] CIA, [redacted] 1484, [redacted], 2004, p. 2.

[381] CIA, ALEC [redacted] [redacted]

[382] *See* SSCI Study, Executive Summary, December 3, 2014, p. 417.

[383] SSCI Study, Executive Summary, December 3, 2014, p. 348.

[384] CIA, CIA CABLE 1411, [redacted], 2004, p. 4.

[385] CIA, CIA CABLE 1411, [redacted], 2004, p. 5.

[386] SSCI Study, Executive Summary, December 3, p. 343.

(U) *The Identification of Bin Ladin's Courier*

~~(TS~~[redacted]~~NF)~~ Shortly after the May 2011 raid on the Usama Bin Ladin compound, current and former CIA employees highlighted the role of reporting from the CIA Detention and Interrogation Program in the operation. These officials represented that CIA detainees provided the "tip-off" information on Abu Ahmad al-Kuwaiti (variant Abu Ahmed al-Kuwaiti), the Bin Ladin courier who ultimately led to finding Bin Ladin.[387] As we show below, these representations were accurate.

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"[T]he 'tipoff' on Abu Ahmad al-Kuwaiti in 2002 did not come from the interrogation of CIA detainees and was obtained prior to any CIA detainee reporting."[388]**

Fact: ~~(TS~~[redacted]~~NF)~~ **CIA documents show that detainee information served as the "tip-off" and played a significant role in leading CIA analysts to the courier Abu Ahmad al-Kuwaiti. While there was other information in CIA databases about al-Kuwaiti, this information was not recognized as important by analysts until after detainees provided information on him.**

~~(TS~~[redacted]~~NF)~~ In the days immediately after the Bin Ladin raid, CIA analysts and operators testified before the Committee about how they tracked down Bin Ladin. The CIA described the lead information as being provided by detainees in U.S. custody at CIA secret sites and the detention facility at Guantanamo Bay, Cuba, and from detainees in the custody of foreign governments that helped the CIA recognize the importance of Bin Ladin's courier, Abu Ahmad al-Kuwaiti.[389] CIA officers were clear that the information was from detainees, but never portrayed the information as originating solely from detainees held by the CIA.

~~(TS~~[redacted]~~NF)~~ CIA documents show that even before the raid took place, CIA analysts prepared briefings and papers on their analysis of what led them to the courier. These briefings and papers clearly described the key role that detainee reporting played in this analytical and operational process. A CIA paper in November 2007 noted that "over twenty mid to high-value detainees have discussed Abu Ahmad's ties to senior al-Qa'ida leaders, including his role in delivering messages from Bin Ladin and his close association with former al-Qa'ida third-in-command Abu Faraj al-Libi."[390] The report highlighted specific reporting from two detainees, Hassan Ghul and Ammar al-Baluchi, who both identified Abu Faraj al-Libi's role in communicating to Bin Ladin through Abu Ahmad. It was this and similar reporting from other detainees that helped analysts realize Abu Faraj's categorical denials that he even knew anyone named Abu Ahmad al-Kuwaiti, "almost certainly were an attempt to protect Abu Ahmed," thus showing his importance.[391]

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[387] SSCI and SASC Transcript, *Briefing on Operation Neptune's Spear*, May 4, 2011, pp. 53-54 (DTS 2011-2049) (CIA Director Panetta stated, "I want to be able to get back to you with specifics . . . But clearly the tipoff on the couriers came from those [detainee] interviews."); Scott Hennen radio interview of former CIA Director Michael Hayden, May 3, 2011 (Former Director Hayden stated, "What we got, the original lead information—and frankly it was incomplete identity information on the couriers—began with information from CIA detainees at the black sites").

[388] SSCI Study, Executive Summary, December 3, 2014, p. 389.

[389] SSCI Transcript, *Briefing on the Operation That Killed Usama Bin Ladin*, May 2, 2011, pp. 7 and 39 (DTS 2011-1941).

[390] CIA Intelligence Assessment, *Al-Qa'ida Watch. Probable Identification of Suspected Bin Ladin Facilitator Abu Ahmad al-Kuwaiti*, November 23, 2007, p. 2.

~~(TS~~[redacted]~~NF)~~ Additionally, a retrospective prepared by the CIA's Study for the Center of Intelligence after the raid also made clear in its report that detainee information was significant in the identification of the courier. The report noted that High-Value Terrorist analysts, targeters, and their managers told the Center that:

> debriefing al-Qa'ida detainees provided them with unparalleled expertise and knowledge of the organization. The ability to cross-check detainee statements against one another—specifically Abu Faraj's with that of numerous other detainees—ultimately led to the assessment that Abu Ahmad was directly serving as Bin Ladin's facilitator and possibly harboring him. In sum, 25 detainees provided information on Abu Ahmad al-Kuwaiti, his al-Qa'ida membership, and his historic role as a courier for Bin Ladin. Nine of the 25 were held in non-CIA custody. Of the 16 held in CIA custody, all but three had given information after being subjected to enhanced interrogation techniques (EITs), although of the 13 only two (KSM and Abu Zubaydah) had been waterboarded. Even so, KSM gave false information about Abu Ahmad, as did Abu Faraj, who received lesser EITs. Ironically, the falsity of the information was itself important in establishing Abu Ahmad's significance.[392]

~~(TS~~[redacted]~~NF)~~ The Study asserts that information acquired in 2002 [redacted] was the "tip-off" to Abu Ahmad al-Kuwaiti, but this information sat unnoticed in a CIA database for five years.[393] It was multiple detainee reports about a Bin Ladin courier with the alias Abu Ahmad al-Kuwaiti that triggered a search that uncovered the old information.[394] This is another example of the Study's use of hindsight to criticize the CIA for not recognizing the significance of previously collected, but not fully-understood, intelligence information. It is also an attempt to use this [redacted] information to categorize the subsequently collected detainee information as being "otherwise obtainable." Under the Study's flawed analytical methodology, information in that category cannot be used as evidence of the effectiveness of the CIA's Detention and Interrogation Program. We are not similarly constrained.

~~(TS~~[redacted]~~NF)~~ The Study—benefiting from the ability to search a database compiled of only information relevant to its specific task (something intelligence analysts are not able to do) with the advantage of hindsight to understand which names are now important—asserts that prior to receiving information from CIA detainees, the CIA had other critical reporting on the courier. The Study cites Abu Ahmad's phone number and e-mail address, a body of intelligence reporting linking him to KSM's operational planning, and reporting on Abu Ahmad's age, physical appearance, and family—including information the CIA would later cite as pivotal in identifying his true name.[395]

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[391] CIA Intelligence Assessment, *Al-Qa'ida Watch, Probable Identification of Suspected Bin Ladin Facilitator Abu Ahmad al-Kuwaiti*, November 23, 2007, p. 2.

[392] CIA Center for the Study of Intelligence, *Lessons from the Hunt for Usama Bin Ladin*, September 2012, p. 14 (DTS 2012-3826).

[393] CIA Center for the Study of Intelligence, *Lessons from the Hunt for Usama Bin Ladin*, September 2012, p. 9 (DTS 2012-3826).

[394] SSCI Transcript, *Briefing on Operation Neptune's Spear Targeting Usama Bin Ladin, May 4, 2011*, pp. 13-14, 47-49, and 53-54 (DTS 2011-2049).

~~(TS~~[redacted]~~NF)~~ While it is true that the CIA was conducting technical intelligence collection linked to Abu Ahmad al-Kuwaiti in 2002, CIA fact-checking confirmed that this information was meaningless because: (1) it did not link Abu Ahmad to Bin Ladin; (2) Abu Ahmad had stopped using the phone number and e-mail address in 2002; and (3) Abu Ahmad was not linked to that email address in any of his subsequent correspondence.[396] According to the CIA,

> [t] hat intelligence was insufficient to distinguish Abu Ahmad from many other Bin Ladin associates until additional information from detainees put it into context and allowed us to better understand his true role and potential in the hunt for Bin Ladin.[397]

Further review of CIA records confirmed that the phone number at issue was an Inmarsat number associated with "Mukhtar" and "Ahmad 'al-Kuwahadi."[398] According to Adam Robinson, the author of *Bin Laden Behind the Mask of the Terrorist,* "[a]fter a long period of use of the Inmarsat system, Osama learned that this system is open to interception, both for covert observation and possibly for homing in on the signal . . . After he became aware of this, he used the system only periodically for calling his mother."[399] If this claim about Bin Ladin's belief is accurate and al-Qa'ida leadership believed that phones were vulnerable, it may explain why this particular phone number was abandoned by KSM and Abu Ahmad.

~~(TS~~[redacted]~~NF)~~ The information providing Kuwaiti's physical description and family details was critical to ultimately identifying al-Kuwaiti's true name, but not until years later—2007 to be exact—after detainee reporting provided enough information about the courier that a search of old records illuminated key information in that reporting. The CIA Center for the Study of Intelligence said such information was "an unnoticed needle in the haystack on an unending plain of haystacks" until that time.[400] One of the lead CIA analysts called similar information that later turned out to be important "meaningless" until years later when detainee reporting illuminated its importance.[401] Thus, this information really only became critical to the CIA after detainee reporting provided enough information about the courier that a search of old records illuminated key information in that reporting.

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[395] SSCI Study, Executive Summary, December 3, 2014, p. 385.

[396] CIA Study Response, *Case Studies (TAB C),* June 27, 2013, p. 40.

[397] CIA Study Response, *Case Studies (TAB C),* June 27, 2013, p. 38; CIA Study Response, *Comments (TAB A),* June 27, 2013, p. 14.

[398] CIA, ALEC [redacted]

[399] Adam Robinson, *Bin Laden Behind the Mask of the Terrorist,* Arcade Publishing, Inc., New York, 2002, p. 247.

[400] CIA Center for the Study of Intelligence, *Lessons from the Hunt for Usama Bin Ladin,* September 2012, p. 9 (DTS 2012-3826).

[401] CIA Center for the Study of Intelligence, *Lessons from the Hunt for Usama Bin Ladin,* September 2012, p. 9 (DTS 2012-3826).

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"[T]he most accurate information on Abu Ahmad al-Kuwaiti obtained from a CIA detainee [Hassan Ghul] was provided by a CIA detainee who had not yet been subjected to the CIA's enhanced interrogation techniques."[402]**

Fact: ~~(TS~~[redacted]~~NF)~~ **Detainees who provided useful and accurate information on Abu Ahmad al-Kuwaiti and Bin Ladin had undergone enhanced interrogation prior to providing the information. For example, Hassan Ghul provided more specificity about Abu Ahmad after being transferred from COBALT and receiving enhanced interrogation techniques.**

(U) The Study disputes statements from current and former CIA officials that information from detainees in CIA's enhanced interrogation program provided valuable information on Abu Ahmad al-Kuwaiti. For example, then-CIA Director Leon Panetta told ABC News in May 2011, soon after the Bin Ladin raid, that enhanced interrogation techniques were used to extract information that led to the mission's success.[403] Former Director Hayden said in an interview that "the original lead information—and frankly it was incomplete identity information on the couriers—began with information from CIA detainees at the black sites."[404] Both of these statements are accurate.

~~(TS~~[redacted]~~NF)~~ While numerous detainees at CIA black sites provided information on Abu Ahmad al-Kuwaiti, as noted above, two detainees, Hassan Ghul and Ammar al-Baluchi, in particular were cited by the lead CIA analyst as leading her to search old intelligence files.[405] Ammar al-Baluchi, who appears to be the first detainee to mention Abu Ahmad al-Kuwaiti's role as a Bin Ladin courier and a possible connection with Abu Faraj al-Libi, provided this information at a CIA black site during a period of enhanced interrogation.[406]

~~(TS~~[redacted]~~NF)~~ The second detainee, Hassan Ghul, is described in the Study as providing the "best" and "most accurate" information on the courier. While we are not sure it was the "best" or "most accurate" information, a CIA report on the Bin Ladin raid described Ghul's information as a "milestone in the long analytic targeting trek that led to Bin Ladin."[407] Clearly it was important. According the CIA,

> Gul, while in CIA custody–before undergoing enhanced techniques–speculated that Abu Ahmad could be one of three people with Bin Ladin and speculated that

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[402] SSCI Study, Executive Summary, December 3, 2014, p. 379.

[403] Interview with CIA Director Leon Panetta, Brian Williams, ABC News, May 3, 2011.

[404] Interview with former CIA Director Michael Hayden, Scott Hennen Show, May 3, 2011.

[405] CIA Intelligence Assessment, *Al-Qa'ida Watch, Probable Identification of Suspected Bin Ladin Facilitator Abu Ahmad al-Kuwaiti*, November 23, 2007, p. 2.

[406] CIA, WASHINGTON DC [redacted] Ammar al-Baluchi attempted to recant his earlier description of Abu Ahmad as a Bin Ladin courier. CIA, DIRECTOR [redacted]

[407] CIA Center for the Study of Intelligence, *Lessons from the Hunt for Usama Bin Ladin*, dated September 2012, p. 9 (DTS 2012-3826).

> Abu Ahmad may have handled Bin Ladin's needs, including sending messages to his gatekeeper, Abu Faraj al-Libi.[408]

Additional CIA fact-checking explained that Ghul offered more details about Abu Ahmad's role after being transferred from COBALT and receiving enhanced interrogation. Specifically, the CIA stated:

> After undergoing enhanced techniques, Gul stated that Abu Ahmad specifically passed a letter from Bin Ladin to Abu Faraj in late 2003 and that Abu Ahmad had "disappeared" from Karachi, Pakistan, in 2002. This information was not only more concrete and less speculative, it also corroborated information from Ammar that Khalid Shaykh Muhammad (KSM) was lying when he claimed Abu Ahmad left al-Qa'ida in 2002.[409]

Ghul stated that while he had "no proof," he believed that Abu Faraj was in contact with Abu Ahmad and that Abu Ahmad might act as an intermediary contact between Abu Faraj and Bin Ladin. Ghul said that this belief "made sense" since Abu Ahmad had disappeared and Ghul had heard that Abu Ahmad was in contact with Abu Faraj.[410] Months later, Ghul also told his interrogators that he knew Abu Ahmad was close to Bin Ladin, which was another reason he suggested that Abu Ahmad had direct contact with Bin Ladin as one of his couriers.[411]

~~(TS~~[redacted]~~NF)~~ CIA documents make clear that when detainees like Abu Zubaydah, KSM, and Abu Faraj al-Libi—who had undergone enhanced interrogation and were otherwise cooperative—denied knowing Abu Ahmad al-Kuwaiti or suggested that he had "retired," it was a clear sign to CIA analysts that these detainees had something to hide, and it further confirmed other detainee information that had tipped them off about the true importance of Abu Ahmad al-Kuwaiti.[412]

(U) Conclusion 6 (CIA Impeded Congressional Oversight)

~~(TS~~[redacted]~~NF)~~ Conclusion 6 states: "[t]he CIA has actively avoided or impeded congressional oversight of the program."[413] In reality, the overall pattern of engagement with the Congress on this issue shows that the CIA attempted to keep the Congress informed of its activities. From 2002 to 2008, the CIA claims to have provided more than 35 briefings to SSCI members and staff, more than 30 similar briefings to HPSCI members and staff, and more than 20 congressional notifications.[414] For some of these briefings, there are no transcripts[415], likely because they were limited to the Chairman and Vice Chairman/Ranking Member of the congressional intelligence committees. Because the Study did not interview the participants in these restricted briefings, it is impossible to document how much information the CIA provided to Committee leadership during those briefings. Often, the Study's own examples contradict the assertion that the CIA tried to avoid its overseers' scrutiny. For example, the Study notes that the CIA reacted to Vice Chairman Rockefeller's suspicion about the agency's honesty by planning a detailed briefing on the Program for him.[416]

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[408] CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 38 (citing CIA, DIRECTOR [redacted]

[409] CIA Study Response, *Case Studies (TAB C)*, June 27, 2013, p. 38 (citing CIA, [redacted]

[410] CIA, [redacted]

[411] CIA, DIRECTOR [redacted]

[412] CIA, DIRECTOR [redacted] CIA Center for the Study of Intelligence, *Lessons from the Hunt for Usama Bin Ladin*, dated September 2012, pp. 9-10 (DTS 2012-3826); CIA Intelligence Assessment, *Al-Qa'ida Watch, Probable Identification of Suspected Bin Ladin Facilitator Abu Ahmad al-Kuwaiti*, November 23, 2007, p. 2.

[413] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5.

[414] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 35.

(U) *Timing of the CIA's Briefings on Enhanced Interrogation Techniques*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The CIA did not brief the Senate Intelligence Committee leadership on the CIA's enhanced interrogation techniques until September 2002, after the techniques had been approved and used."[417]**

Fact: ~~(TS~~[redacted]~~NF)~~ **The CIA provided information to the Committee in hearings, briefings, and notifications beginning shortly after the signing of the Memorandum of Notification (MON) on September 17, 2001.**

~~(TS~~[redacted]~~NF)~~ Conclusion 6 opens with the statement that the CIA did not brief the Senate Intelligence Committee leadership on the CIA's enhanced interrogation techniques until after the techniques had been approved and used, setting the tone for a narrative that the CIA actively and systematically concealed information from the Congress. In reality, the CIA began discussing concerns about interrogation with the Committee even prior to the creation of the Program. The Study's review of the CIA's representations to Congress cites CIA hearing testimony from November 7, 2001, discussing the uncertainty in the boundaries on interrogation techniques.[418] The Study also cites additional discussions between staff and CIA lawyers in February 2002.[419]

~~(TS~~[redacted]~~NF)~~ The Study seems to fault the CIA for not briefing the Committee leadership until after the enhanced interrogation techniques had been approved and used. The CIA briefed HPSCI leadership on September 4, 2002. SSCI leadership received the same briefing on September 27, 2002.[420] The Study does not include information on when the CIA offered briefings to Congress or how long it took to schedule them. Briefing Committee leadership in the month after beginning a new activity does not constitute actively avoiding or impeding congressional oversight.

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[415] SSCI Study, Executive Summary, December 3, 2014, p. 441.

[416] SSCI Study, Executive Summary, December 3, 2014, p. 441.

[417] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5.

[418] SSCI Study, Executive Summary, December 3, 2014, p. 437 n.2447. *See also* SSCI Transcript, *Briefing on Covert Action*, November 7, 2001, p. 56 (DTS 2002-0611).

[419] SSCI Study, Executive Summary, December 3, 2014, p. 437. *See also* Email from: Christopher Ford, SSCI Staff, to: [redacted] Cleared SSCI staff; subject: Meeting yesterday with CIA lawyers on [redacted]; date: February 26, 2002 (DTS 2002-0925).

[420] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 36.

(U) *Access to Documents*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The CIA subsequently resisted efforts by then-Vice Chairman John D. Rockefeller, IV, to investigate the program, including by refusing in 2006 to provide requested documents."[421]**

Fact: ~~(TS~~[redacted]~~NF)~~ **The CIA provided access to the documents requested.**

~~(TS~~[redacted]~~NF)~~ The Study asserts that the CIA refused to provide requested documents. However, this misrepresents both the Vice Chairman's document request and the Intelligence Community's response. As noted in the Study, on January 5, 2006, the Director of National Intelligence's Chief of Staff wrote a letter to Vice Chairman Rockefeller which denied an earlier request for full Committee access to over 100 documents related to the Inspector General's May 2004 Special Review.[422] However, this denial of "full Committee access," did not mean that the documents were not made available to the CIA's congressional overseers. In fact, the Chief of Staff's letter stated, "Consistent with the provisions of the National Security Act of 1947, the White House has directed that specific information related to aspects of the detention and interrogation program be provided only to the SSCI leadership and staff directors."[423] The letter concluded by advising Vice Chairman Rockefeller that the documents "remain available for review by SSCI leadership and staff directors at any time through arrangements with CIA's Office of Congressional Affairs."[424]

(U) *Breadth of Congressional Access*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **The CIA impeded congressional oversight by restricting access to information about the Program from members of the Committee beyond the Chairman and Vice Chairman.[425]**

Fact: ~~(TS~~[redacted]~~NF)~~ **The CIA's limitation of access to sensitive covert action information is a long-standing practice codified in Section 503 of the National Security Act of 1947, as amended.**

~~(TS~~[redacted]~~NF)~~ The Study notes numerous times that the CIA refused to provide information on its Detention and Interrogation Program to Committee members and staff.[426] The underlying assertion is that the CIA's restriction of access to the Chairman and Vice Chairman somehow constituted an attempt to avoid or impede congressional oversight of the Program. This is simply untrue. According to section 503(c)(2) of the National Security Act of 1947, as amended:

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[421] SSCI Study, Findings and Conclusions, December 3, 2014, pp. 5-6.
[422] SSCI Study, Executive Summary, December 3, 2014, p. 442.
[423] Letter from David Shedd to Andy Johnson, January 5, 2006 (DTS 2006-0373).
[424] Letter from David Shedd to Andy Johnson, January 5, 2006 (DTS 2006-0373).
[425] SSCI Study, Findings and Conclusions, December 3, 2014, p. 6.
[426] SSCI Study, Executive Summary, December 3, 2014, pp. 439-441.

> If the president determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.

The CIA's decision to limit the briefing of this particularly sensitive covert action program to the Chairman and Vice Chairman was in keeping with customary practice and complied with the law. The Committee has conducted oversight of other sensitive covert action programs under similar access limitations and continues to do so at this time.

~~(TS~~[redacted]~~NF)~~ The Study notes that the CIA briefed a number of additional senators who were not on the Select Committee on Intelligence.[427] As cited above, the law allows the President discretion to provide senators with information about covert action programs at his discretion, without regard to Committee membership. Moreover, providing a briefing to inform key senators working on legislation relevant to the CIA's program is inconsistent with the narrative that the CIA sought to avoid congressional scrutiny.

(U) Conclusion 7 (CIA Impeded White House Oversight)

(U) Conclusion 7 states, "[t]he CIA impeded effective White House oversight and decision-making."[428] It is important to place this serious allegation within its proper context—the CIA's Detention and Interrogation Program was conducted as a covert action.[429] Covert action is the sole responsibility of the White House, a principle enshrined in law since the National Security Act of 1947.[430] The President, working with his National Security Staff, approves and oversees all covert action programs. The congressional intelligence committees also conduct ongoing oversight of all covert actions and receive quarterly covert action briefings. Given this extensive covert action oversight regime, this conclusion seems to imply falsely that the CIA was operating a rogue intelligence operation designed to "impede" the White House. We reject this unfounded implication and it appears the CIA has rejected it as well:

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[427] SSCI Study, Executive Summary, December 3, 2014, p. 443.

[428] SSCI Study, Findings and Conclusions, December 3, 2014, p. 6.

[429] *See* SSCI Study, Executive Summary, December 3, 2014, p. 11. "On September 17, 2001, six days after the terrorist attacks of September 11, 2001, President George W. Bush signed a covert action MON to authorize the Director of Central Intelligence (DCI) to '*undertake operations designed to capture and detain* persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities.'" (emphasis added).

[430] In 1974, the Hughes-Ryan amendment to the Foreign Assistance Act of 1961 created the requirement for presidential "Findings" for covert action. The Intelligence Oversight Acts of 1980 and 1988 amended the Finding process, and the Intelligence Oversight Act of 1991 replaced Hughes-Ryan with the current Finding process. *See* William Daugherty, *Executive Secrets, Covert Action and the Presidency*, The University Press of Kentucky, 2004, pp. 92-98.

> While we were able to find points in the preceding themes with which to both agree and disagree, the *Study* seems to most seriously diverge from the facts and, indeed, from simple plausibility in its characterizations of the manner in which CIA dealt with others with regard to the RDI program. The *Study* would have the reader believe that CIA 'actively' avoided and interfered with oversight by the Executive Branch and Congress . . . [and] withheld information from the President . . . .
>
> We would observe that, to accomplish this, there would have had to have been a years-long conspiracy among CIA leaders at all levels, supported by a large number of analysts and other line officers. This conspiracy would have had to include three former CIA Directors . . . .
>
> We cannot vouch for every individual statement that was made over the years of the program, and we acknowledge that some of those statements were wrong. But the image portrayed in the *Study* of an organization that–on an institutional scale–intentionally misled and routinely resisted oversight from the White House, the Congress, the Department of Justice, and its own OIG simply does not comport with the record. . . .
>
> [The] CIA did not, as the *Study* alleges, intentionally misrepresent to anyone the overall value of the intelligence acquired, the number of detainees, the propensity of detainees to withhold and fabricate, or other aspects of the program.[431]

Our analysis of the documentary record demonstrates that most of the CIA's representations about the Detention and Interrogation Program were accurate.

(U) *Executive Branch Oversight*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"According to CIA records, no CIA officer, up to and including CIA Directors George Tenet and Porter Goss, briefed the President on the specific CIA enhanced interrogation techniques before April 2006. By that time, 38 of the 39 detainees identified as having been subjected to the CIA's enhanced interrogation techniques had already been subjected to the techniques."**[432]

Fact: **(U) CIA records are contradictory and incomplete regarding when the President was briefed, but President Bush himself says he was briefed in 2002, before any techniques were used.**[433]

~~(TS~~[redacted]~~NF)~~ The Study finds that the CIA "impeded" executive branch oversight, not just by withholding information about the Program, but by providing inaccurate information about its operation and effectiveness. Beginning with the premise that the CIA did not obtain approval from the President or the National Security Council prior to using enhanced interrogation techniques on Abu Zubaydah, the Study identifies records that cast some doubt on whether the President was briefed before April 2006.[434] However, CIA records are inconsistent on this point.

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[431] CIA Study Response, *Comments (TAB A)*, June 27, 2013, pp. 15-16 (emphasis in original).
[432] SSCI Study, Findings and Conclusions, December 3, 2014, p. 6.
[433] George W. Bush, *Decision Points*, Broadway Paperbacks, New York, 2010, p. 169.

~~(TS~~[redacted]~~NF)~~ One chronology of the approvals obtained for the CIA program, dated April 2008, lists a meeting held on August 1, 2002, between the President and the Deputy Director of the CIA concerning the "Next Phase of the Abu Zubaydah Interrogation," which strongly suggests that the President had been briefed on the interrogation. Another undated chronology, however, notes that, according to a July 31, 2002, memorandum, the National Security Council communicated to the CIA that the President would not be briefed.[435] An Inspector General interview with former DCI Tenet also suggests that he did not brief the President on enhanced interrogation techniques (EITs). Tenet said "he had never spoken to the President regarding EITs, nor was he aware of whether the President had been briefed by his staff."[436] An interview of the former Director or his staff, or a review of Director Tenet's e-mail communications and those of his staff, might also have helped clarify this point.

(U) Since no interviews were conducted and since—as we learned during the course of our review of the Study material—the majority never requested e-mail communications from Director Tenet or other senior CIA leaders, such a clarification was impossible. In fact, as noted earlier, we learned that the majority did not request the e-mail communications of *any* senior CIA leaders who likely would have discussed the Program with the President—not Director Tenet, Director Goss, Deputy Director McLaughlin, Director of Operations Pavitt, Director of Operations Kappes, Director of the Counterterrorism Center Bob Grenier, and many others. Because of this gap in emails from critical participants, the majority's document review is incomplete. In the absence of interviews and with the gap in documents, the Study's reliance on the CIA records it did review, therefore, is simply not definitive on whether the President was briefed on the use of interrogation techniques on Zubaydah. Yet the Study interprets the absence of clarity on this point as confirmation that the CIA must have withheld information from the President.

(U) There is at least one person, however, who disputes this narrative and says that the President was briefed and approved the use of enhanced techniques on Zubaydah—President George W. Bush. In his book, *Decision Points,* the President has a different recollection than Director Tenet. The President recalls being told that Abu Zubaydah was withholding information; that "CIA experts drew up a list of interrogation techniques that differed from those Zubaydah had successfully resisted;" and that "Department of Justice and CIA lawyers conducted a careful legal review."[437] He describes looking at the list of techniques, including waterboarding, and approving their use, while directing the CIA not to use two of them that he "felt went too far, even if they were legal."[438] President Bush also confirms that he approved the use of enhanced interrogation techniques, including the waterboard, on KSM.[439] So while the Study assumes the President did not give his approval prior to the use of enhanced techniques on Abu Zubaydah because the majority cannot find CIA records that unequivocally say when and how it happened, the President's own words set the record straight.[440]

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[434] *See, e.g.,* SSCI Study, Findings and Conclusions, December 3, 2014, p.18 n.17, SSCI Study, Executive Summary, December 3, 2014, pp. 38-40.

[435] Chronology of Renditions, *Detainees and Interrogations Program and Interrogation Approvals: 2001-2008*, undated; *see also April 3, 2014,* SSCI Study, Executive Summary, December 3, 2014, p. 40 n.179.

[436] Office of the General Counsel, Comments on the Inspector General, Special Review, Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003), May 7, 2004 (DTS 2004-2710).

[437] Bush, p. 169.

~~(TS~~[redacted]~~NF)~~ Regardless, even if it were true that the President had not been briefed by the CIA, we find it odd that the Study would assign blame for "withholding information" to the CIA, when the Study itself acknowledges the role of officials outside the CIA in making determinations about what should be briefed to policymakers. For example, the Study correctly notes that the description of the waterboard was removed from the 2002 Deputy DCI (DDCI) talking points for the meeting with the President, but its account of why this change was made is misleading.[441] In describing an e-mail regarding the planned briefing, the Study states that "per an agreement between DCI Tenet and White House Counsel Gonzales, the briefing would include no 'further details about the interrogation techniques than those in the (revised) talking points.'"[442] In reality, the e-mail says that the "WH asks that DDCI brief POTUS tomorrow at 0800 meeting without any further details about the interrogation techniques than those in the talking points."[443] Thus, it was at the request of the White House—not the CIA, that only a broad description of the nature of the techniques would be provided; specifically, that the "techniques incorporate mild physical pressure, while others may place Abu Zubaydah in fear for his life" and they "include an intense physical and psychological stressor used by the U.S. Navy in its interrogation resistance training for the Navy SEALS."[444]

(U) *Accuracy of Information Provided*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The information provided connecting the CIA's detention and interrogation program directly to [the "Dirty Bomb" Plot/Tall Buildings Plot, the Karachi Plots, Heathrow and Canary Wharf**

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[438] Bush, p. 169.

[439] Bush, p. 170, ("George Tenet asked if he had permission to use enhanced interrogation techniques, including waterboarding, on Khalid Sheikh Mohammed. I thought about my meeting with Danny Pearl's widow, who was pregnant with his son when he was murdered. I thought about the 2,973 people stolen from their families by al Qaeda on 9/11. And I thought about my duty to protect the country from another act of terror. 'Damn right,' I said").

[440] The CIA Study response also made reference to President Bush's autobiography, noting that "he discussed the program, including the use of enhanced techniques, with then [DCI] Tenet in 2002, prior to the application of the techniques on Abu Zubaydah, and personally approved the techniques." CIA Study Response, *Conclusions*, p. 6. The Study chooses to rebut President Bush's recollections of these events by stating, "A memoir by former Acting CIA General Counsel John Rizzo disputes the President's autobiographical account." SSCI Study, Findings and Conclusions, December 3, 2014, p.18 n17. Again, further clarification of these events was hampered by the lack of witness interviews.

[441] SSCI Study, Executive Summary, December 3, 2014, p. 38.

[442] SSCI Study, Volume I, March 31, 2014, p. 135.

[443] CIA, E-mail to DDCI, dated July 31, 2002, *Briefing of POTUS tomorrow (1 Aug) re AZ interrogation.*

[444] DDCI Talking Points for Meeting with the President, 31 July 2001 (sic).

Plot, and the Identification/Capture of Iyman Faris] was, to a great extent, inaccurate."[445]

Fact: **(U) The information provided to the White House attributing the arrests of these terrorists and the thwarting of these plots to the CIA's Detention and Interrogation Program was accurate.**

~~(S//NF)~~ The Study accuses the CIA of providing inaccurate information to the White House and the National Security Council Principals about the Program and its effectiveness. Pivotal to this allegation is a July 29, 2003, briefing that the CIA Director and General Counsel had with executive branch officials, including the Vice President, the National Security Advisor, the White House Counsel, and the Attorney General. According to the six-page memorandum for the record prepared by the CIA General Counsel on August 5, 2003, the purpose of the meeting was to "discuss current, past and future CIA policies and practices concerning the interrogation of certain detainees held by CIA."[446]

~~(TS~~[redacted]~~NF)~~ The Study notes that the memorandum provided four of the eight "most frequently cited examples from 2002-2009" as evidence of the effectiveness of CIA's interrogation program, including: "the 'dirty bomb' plot/tall buildings plot (also referenced as the Capture of Jose Padilla), the Karachi Plots, the Heathrow and Canary Wharf Plot, and the Identification/Capture of Iyman Faris."[447] While the Study asserts, "the information provided connecting the CIA's detention and interrogation program directly to the above disruptions and captures was, to a great extent, inaccurate," we found that the examples provided were, in fact, accurate.[448]

(U) Conclusion 8 (CIA Impeded National Security Missions of Executive Branch Agencies)

(U) Conclusion 8 states, "[t]he CIA's operation and management of the program complicated, and in some cases impeded, the national security missions of other Executive Branch agencies."[449]

~~(TS~~[redacted]~~NF)~~ The standard by which the Study claims the CIA "impeded" national security missions of other executive branch agencies is based entirely on subjective standards that are never defined in the text. Equally problematic are statements that the CIA blocked or denied requests for information from other executive branch agencies. By inference this implies the President and the National Security Council did not control access to the covert action program. However, the September 17, 2001, Memorandum of Notification authorizing the detainee program, states: "Approval of the Principals shall be sought in advance whenever feasible with respect to such operations . . . ."[450] As noted in the CIA response to the Study, "the National Security Council established the parameters for when and how CIA could engage on the program with other executive branch agencies."[451] The CIA was not responsible nor did it have control over the sharing or dissemination of information to other executive branch agencies or members of the Principals Committee itself. That responsibility rested solely with the White House.

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[445] SSCI Study, April 1, 2014, Volume II, p. 446.
[446] CIA General Counsel Memorandum for the Record, August 5, 2003, *Review of Interrogation Program on 29 July 2003.*
[447] SSCI Study, Volume II, April 1, 2014, p. 446.
[448] *See supra, The Thwarting of the Dirty Bomb/Tall Buildings Plot and the Capture of Jose Padilla,* pp. 33-36; *The Thwarting of the Karachi Plots,* pp. 45-47; *The Heathrow and Canary Wharf Plots,* pp. 47-50; and *The Arrest and Prosecution of Iyman Faris,* pp. 58-61.
[449] SSCI Study, Findings and Conclusions, December 3, 2014, p. 7.

(U) *Access to the Covert Action Program*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The CIA blocked State Department leadership from access to information crucial to foreign policy decision-making and diplomatic activities."[452]**

Fact: ~~(TS~~[redacted]~~NF)~~ **The National Security Staff controlled access to the covert action program and there is no evidence that the CIA refused to brief State Department leadership when directed.**

~~(TS~~[redacted]~~NF)~~ The Study does not provide any evidence that the CIA deliberately impeded, obstructed or blocked the State Department from obtaining information about the Program inconsistent with directions from the White House or the National Security Council. In fact, the Study acknowledges that CIA officers were in close and constant contact with their State Department counterparts where detention facilities were located and among senior leadership to include the Secretary of State and the U.S. Deputy Secretary of State. For example, leading to the establishment of a facility in Country[redacted], the Study notes that the chief of station (COS) was coordinating activities with the ambassador. Because the Program was highly compartmented, the ambassador was directed by the National Security Council not to discuss with his immediate superior at headquarters due to the highly compartmented nature of the covert action. Instead, the COS, sent feedback from the ambassador through CIA channels, to the NSC, whereby the Deputy Secretary of State with the knowledge of the Secretary, would discuss any issues or concerns with the ambassador in country.[453] While the process was less direct, the security precautions to protect sensitive information did not impede the national security mission of the State Department.

(U) *CIA Denied FBI Requests*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The CIA denied specific requests from FBI Director Robert Mueller, III, for FBI access to CIA detainees that the FBI believed was necessary to understand CIA detainee reporting on threats to the U.S. Homeland."[454]**

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[450] DTS 2002-0371, p. 3.

[451] CIA Study Response, *Comments (TAB A)*, June 27, 2013, p. 11.

[452] SSCI Study, Findings and Conclusions, December 3, 2014, p. 7.

[453] [redacted] CIA CABLE [redacted] CIA CABLE [redacted] CIA CABLE [redacted]

[454] SSCI Study, Findings and Conclusions, December 3, 2014, p. 7.

Fact: ~~(TS~~[redacted]~~NF)~~ **While the FBI's participation in the interrogation of detainees was self-proscribed, the Bureau was still able to submit requirements to the CIA and received reports on interrogations.**

(~~TS~~[redacted]~~NF~~) This Study claim appears to focus on FBI access to KSM in 2003 after FBI Director Mueller read an interrogation report that vaguely referenced possible threats to New York, Washington, DC, Chicago, Dallas, and San Francisco.[455] However, the Study acknowledges the FBI's fear that the use of enhanced techniques activity would place FBI agents at future legal risk if they participated in interrogations.[456] Recognizing the need for FBI access to detainees, both agencies finalized a memorandum of understanding in the fall of 2003 that detailed how FBI [redacted] agents would be provided access to detainees [redacted]"[457]

(U) *The ODNI was Provided with Inaccurate and Incomplete Information*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The ODNI was provided with inaccurate and incomplete information about the program, preventing the ODNI from effectively carrying out its statutory responsibility to serve as the principal advisor to the President on intelligence matters."[458]**

Fact: ~~(TS~~[redacted]~~NF)~~ **The Study incorrectly claims that inaccurate information was provided to the Office of the Director of National Intelligence.**

(U) The updated Study treats this claim differently than it did in the version that was adopted by the Committee during the 112th Congress. The original Study sought to dispute claims regarding the use of enhanced interrogation techniques and disruption of several plots. However, the updated Study drops the direct reference to coercive measures and instead focuses on the Detention and Interrogation Program in general.[459] The 2006 press release from the Office of Director of National Intelligence[460] does not reference the use of enhanced interrogation techniques, but states unequivocally: "The detention of terrorists disrupts—at least temporarily—the plots they were involved in." To claim that the detention and interrogation of terrorists did not yield intelligence of value is simply not credible.

(U) Conclusion 5 (CIA Provided Inaccurate Information to the Department of Justice)

(U) Conclusion 5 states, "[t]he CIA repeatedly provided inaccurate information to the Department of Justice, impeding a proper legal analysis of the CIA's detention and Interrogation

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[455] SSCI Study, Volume I, March 31, 2014, p. 414.
[456] Email from: James Pavitt; to: [redacted]; subject: Re: Mueller's Interest in FBI Access to KSM; Date: April 24, 2003, 2:35 PM.
[457] SSCI Study, Volume I, March 31, 2014, p. 413.
[458] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[459] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[460] ODNI Press Release, September 6, 2006, "Information on the High Value Terrorist Detainee Program."

Program."[461] Our analysis of the claims used in support of this conclusion revealed that many of the Study's claims were themselves inaccurate or otherwise without merit.

(U) *"Novel" Use of the Necessity Defense*

Study Claim: ~~(TS~~[redacted]~~NF)~~ "CIA attorneys stated that 'a novel application of using the necessity defense' could be used 'to avoid prosecution of U.S. officials who tortured to obtain information that saved many lives.'"[462]

Fact: ~~(TS~~[redacted]~~NF)~~ The draft CIA Office of General Counsel (OGC) legal appendix cited by the report contained a cursory discussion of the necessity defense that *did not* support the use of such defense in the context of the CIA's Detention and Interrogation Program.[463]

(U) This particular claim appears to be a remnant from what had been "Conclusion 2" in the original version of the Study approved by the SSCI during the 112th Congress. Our original minority views were very critical of the claims made in support of the "necessity defense" conclusion. We were pleased to see that the original "Conclusion 2" was dropped from the conclusions in the updated version of the Study; however, we are disappointed to see this factually and legally incorrect claim repeated here in support of a conclusion alleging that the CIA provided inaccurate information to the Department of Justice.

(U) This claim advances the faulty proposition that a "novel application" of the necessity defense could be used by participants in the CIA's Detention and Interrogation Program to avoid criminal liability. On its face, this claim leaves the reader with the false impression that CIA attorneys endorsed the possible use of the "necessity" defense in the context of the CIA's Detention and Interrogation Program, when, in fact, the draft legal appendix cited by the Study[464] actually reached the *opposite* conclusion.[465]

~~(TS~~[redacted]~~NF)~~ Contrary to the Study's claim, the legal analysis provided in the cited draft legal appendix *did not* support the use of the necessity defense in the context of the CIA's program. The Study achieved this erroneous result by modifying the following original quote that it cherry picked from the legal analysis: "It would, therefore, be a novel application of the necessity defense to avoid prosecution of U.S. officials who tortured to obtain information that saved many lives . . . ."[466] Specifically, the Study modified this quote by separating portions of the text and inserting its own factually misleading text, which was not supported by the legal analysis, to achieve the following result: *"CIA attorneys stated that* a novel application of the necessity defense *could be used* to avoid prosecution of U.S. officials who tortured to obtain information that saved lives."[467] Fortunately, this erroneously doctored quotation only appears once in the Study—in this Conclusion.

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[461] SSCI Study, Findings and Conclusions, December 3, 2014, p. 4.

[462] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5.

[463] *See* CIA Office of General Counsel draft *Legal Appendix: Paragraph 5--Hostile Interrogations: Legal Considerations for CIA Officers*, November 26, 2001, pp. 5-6 (CIA, Draft Appendix on Necessity Defense). This document is attached as Appendix IV, *see infra,* p. IV-1.

[464] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5 n.13.

[465] *See* CIA, CIA Draft Appendix on Necessity Defense.

[466] CIA, CIA Draft Appendix on Necessity Defense, p. 6. *See also* SSCI Study, Executive Summary, December 3, 2014, p. 179 (the Study provides an accurate quotation of this text).

~~(TS~~[redacted]~~NF)~~ The Study does, however, cite the original "novel application" quotation in at least 12 different places in its updated report to support its incorrect assertion that CIA attorneys viewed necessity "as a defense" or as a "potential legal defense."[468] While this quotation is technically accurate, it is consistently removed from its context within the legal analysis to create the false impression that the defense of necessity might have been available to CIA employees engaged in interrogation activities. The legal appendix clearly conceded that since "U.S. courts have not yet considered the necessity defense in the context of torture/murder/assault cases . . . [i]t would, therefore, be a novel application of the necessity defense to avoid prosecution . . . ."[469] When the "novel application" quote is placed back into its proper original context, it becomes clear that the legal analysis *did not* conclude that the necessity defense could be used to avoid prosecution. The use of the word "novel" in this context clearly suggests the drafting attorney viewed the approach as problematic.[470]

~~(TS~~[redacted]~~NF)~~ The Study's Executive Summary contains a section entitled, "The Origins of CIA Representations Regarding the Effectiveness of the CIA's Enhanced Interrogation Techniques As Having "Saved Lives," "Thwarted Plots" and "Captured Terrorists."[471] In that section, the Study cites to the "novel application" of the necessity defense contained in the draft legal appendix. This "Origins" section, when combined with the erroneous necessity defense claim made here, appears to have been designed to guide the reader into falsely inferring that the CIA represented that the enhanced interrogation techniques were necessary to acquire "otherwise unavailable" intelligence that "saved lives" because of the draft legal appendix's discussion of the necessity defense.

(U) There are a number of problems with this false inference. If this inference is based simply on the fact that the CIA's representations were made *after* the circulation of the draft legal appendix's discussion of the necessity defense, then the claim is little more than a classic example of *"post hoc"* erroneous reasoning. Simply put, just because the CIA represented that the Program saved lives does not mean that such representations were caused by the draft legal appendix.

~~(TS~~[redacted]~~NF)~~ It seems unlikely that the single appearance of the phrase "saved many lives" in the context of the draft legal appendix's discussion of the necessity defense was the reason behind the use of similar terminology in subsequent accounts of the

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[467] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5 (Erroneous text indicated by italics).

[468] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 19 and 179; SSCI Study, Volume I, March 31, 2014, pp. 55, 220, 255, 262 n.1700, and 283 n.1854; SSCI Study, Volume II, April 1, 2014, pp. 28, 316, and 1753; and SSCI Study, Volume III, March 31, 2014,, pp. 1179 and 1723 n.10679.

[469] CIA, Draft Appendix on Necessity Defense, p. 6.

[470] The CIA confirmed that the use of "novel" in the context of this document meant "tenuous" or "untested," because U.S. courts had not accepted such an argument. *See* CIA Study Response, *Comments*, p. 7 and CIA Study Response, *Conclusions*, pp. 4-5.

[471] SSCI Study, Executive Summary, December 3, 2014, p. 179.

Program. Aside from the false inference made in the "Origins" section, there is no evidence to support this leap of logic.

~~(TS~~[redacted]~~NF)~~ Moreover, the draft legal appendix concluded that the necessity defense did not apply in the context of the CIA's Detention and Interrogation Program. Therefore, this false inference—that the CIA's representations regarding the "otherwise unavailable intelligence" that "saved lives" were the result of efforts to preserve the necessity defense—does not make sense because the draft legal appendix had already concluded that the necessity defense raised in the context of a torture prosecution was unlikely to succeed in a U.S. court.

(U) In this conclusion, the Study appears to buttress its argument about the applicability of the necessity defense in the context of the CIA's Detention and Interrogation Program by noting that OLC included a discussion of the "necessity defense" in its August 1, 2002, memorandum to the White House.[472] That memorandum opinion stated: "*under the current circumstances, necessity or self-defense **may*** justify interrogation methods that *might* violate" the criminal prohibition against torture.[473] Not surprisingly, this August 1, 2002, memorandum opinion was withdrawn in June 2004 and formally superseded in its entirety on December 30, 2004. Specifically, the superseding memorandum stated, "Because the discussion in that memorandum concerning the President's Commander-in-Chief power and *the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows.*"[474] Although the Study acknowledges this subsequent withdrawal of the necessity defense analysis in a footnote,[475] it suggests that OLC included its discussion of the necessity defense at the request of the CIA.[476]

(U) The August 1, 2002, memorandum opinion, however, did finally conclude with the somewhat more definitive statement: "even if an interrogation method might violate [the criminal prohibition against torture], necessity or self-defense could provide justifications that would eliminate any criminal liability."[477] Regardless, the Study's apparent reliance upon this *withdrawn* OLC opinion is misplaced, because it actually seems to undermine its conclusion that the CIA provided inaccurate information to the Department of Justice. Assuming for the sake of argument that the CIA provided OLC with a copy of its legal analysis on the necessity defense—which seems highly unlikely—the CIA legal opinion was correct about necessity being a "novel" application, while the OLC opinion reached a different result by concluding incorrectly that the defense of necessity would eliminate criminal liability.

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[472] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5 (citing DOJ, Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, DOJ, to Alberto R. Gonzales, Counsel to the President, *re: Standards of Conduct for Interrogation*, August 1, 2002).

[473] DOJ, Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, DOJ, to Alberto R. Gonzales, Counsel to the President, *re: Standards of Conduct for Interrogation*, August 1, 2002, p. 46 (emphasis added).

[474] DOJ, Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A*, December 30, 2004, p. 2.

[475] SSCI Study, Executive Summary, December 3, 2014, p. 181 n.1069.

[476] *See* SSCI Study, Executive Summary, December 3, 2014, p. 181.

[477] SSCI Study, Executive Summary, December 3, 2014, p. 180 n.1065 (citing DOJ, Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, DOJ, to Alberto R. Gonzales, Counsel to the President, *re: Standards of Conduct for Interrogation*, August 1, 2002, p. 46).

(U) *Accuracy of Claims about Abu Zubaydah*

Study Claim: ~~(TS~~[redacted]~~NF)~~ The OLC "relied on inaccurate CIA representations about Abu Zubaydah's status in al-Qa'ida and the interrogation team's 'certain[ty]' that Abu Zubaydah was withholding information about planned terrorist attacks."[478]

~~(TS~~[redacted]~~NF)~~ The CIA assessment that Abu Zubaydah was the "third or fourth man" in al-Qa'ida was "based on single-source reporting that was recanted prior to the August 1, 2002, OLC memorandum."[479]

~~(TS~~[redacted]~~NF)~~ "The CIA later concluded that Abu Zubaydah was not a member of al-Qa'ida."[480]

Fact: ~~(TS~~[redacted]~~NF)~~ The information relied upon by the Study to criticize the CIA's representations about Abu Zubaydah withholding of information about planned terrorists attacks neglected to include important statements from within that same intelligence cable, which supported those representations by the CIA.

~~(TS~~[redacted]~~NF)~~ The CIA was in possession of multiple threads of intelligence supporting Abu Zubaydah's prominent role in al-Qa'ida. The [redacted]. The level of detail that the detainee had previously provided about Abu Zubaydah undermined his later attempts to retract his earlier admissions about his involvement in future terrorist attacks [redacted] and his denials about meeting with Abu Zubaydah.

~~(TS~~[redacted]~~NF)~~ The Study's incredible assertion that the "CIA later concluded that Abu Zubaydah was not a member of al-Qa'ida" is factually incorrect.

~~(TS~~[redacted]~~NF)~~ On August 1, 2002, the OLC provided the CIA with a memorandum on its legal analysis of the application of enhanced interrogation techniques to Abu Zubaydah. The Study asserts that "[m]uch of the information provided by the CIA to the OLC, however, was unsupported by CIA records."[481] While the CIA acknowledges that it should have kept OLC better informed and up-to-date, the Agency found no evidence that any information was known to be false when it was provided to OLC.[482]

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[478] SSCI Study, Findings and Conclusions, December 3, 2014, p. 5.

[479] SSCI Study, Executive Summary, December 3, 2014, p. 410.

[480] SSCI Study, Executive Summary, December 3, 2014, p. 410.

[481] SSCI Study, Executive Summary, December 3, 2014, p. 410.

~~(TS~~[redacted]~~NF)~~ The Study claims that the CIA's unsupported representations to OLC included the characterization of Abu Zubaydah as withholding critical threat information.[483] The Study cites an email from the CIA's interrogation team that included the sentence: "[o]ur assumption is the objective of this operation [the interrogation of Abu Zubaydah] is to achieve a high degree of confidence that [Abu Zubaydah] is not holding back actionable information concerning threats to the United States beyond that which [Abu Zubaydah] has already provided."[484] However, this carefully chosen text omits critical statements from later in the same cable: "[t]here is information and analysis to indicate that subject has information on terrorist threats to the United States" and "[h]e is an incredibly strong willed individual which is why he has resisted this long."[485]

~~(TS~~[redacted]~~NF)~~ The Study argues that the CIA provided inaccurate information to OLC which was subsequently included in the OLC legal guidance contained in its August 1, 2002, memorandum.[486] Specifically, the Study argues that the CIA information about Abu Zubaydah's status in al-Qa'ida was inaccurate because the representation that Abu Zubaydah was the "third or fourth man" in al-Qa'ida was based on single source reporting of a [redacted] who had recanted prior to the issuance of the memorandum, and unbelievably, "***[t]he CIA later concluded that Abu Zubaydah was not a member of al-Qa'ida***."[487] Our review of the underlying documents revealed that both of these Study assertions were wrong.

~~(TS~~[redacted]~~NF)~~ The Study criticizes the CIA representation that Abu Zubaydah was the "third or fourth man" in al-Qa'ida was based on a single source who had recanted prior to the drafting of the August 1, 2002, OLC memorandum.[488] The CIA counters this criticism by stating that the Agency had:

> multiple threads of reporting indicating that Zubaydah was a dangerous terrorist, close associate of senior al Qa'ida leaders, and was aware of critical logistical and operational details of the organization, whether or not he held formal rank in al-Qa'ida. Analysts did not alter their fundamental assessment of Zubaydah's

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[482] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 32.
[483] SSCI Study, Executive Summary, December 3, 2014, p. 411.
[484] CIA, [REDACTED] 73208, July 23, 2003, p. 3; Email from: CIA staff officer; to: [REDACTED], [REDACTED], [redacted]; subject: Addendum from [redacted], [REDACTED] 73208 (231043Z JUL 02); date: July 23, 2004, at 07:56:49 PM. *See also* email from: [REDACTED]; to: [REDACTED]; subject: Re: Grayson SWIGERT and Hammond DUNBAR; date: August 8, 21, 2002, at 10:21 PM.
[485] CIA, [REDACTED] 73208, July 23, 2003, p. 3; email from: CIA staff officer; to: [REDACTED], [REDACTED], [redacted]; subject: Addendum from [redacted], [REDACTED] 73208 (231043Z JUL 02); date: July 23, 2004, at 07:56 PM. *See also* Email from: [REDACTED]; to: [REDACTED]; subject: Re: Grayson SWIGERT and Hammond DUNBAR; date: August 8, 21, 2002, at 10:21 PM.
[486] SSCI Study, Executive Summary, December 3, 2014, p. 410.
[487] SSCI Study, Executive Summary, December 3, 2014, p. 410 (emphasis added).
[488] SSCI Study, Executive Summary, December 3, 2014, p. 410.

intelligence value as a result of anything said or later recanted by the single source.[489]

[redacted] [redacted] who had admitted that he was sent by Abu Zubaydah to conduct terrorist operations [redacted], including an attack on a U.S. embassy.[490] [redacted] had also reported to interrogators that Abu Zubaydah was considered the "third or fourth ranking individual after Bin Ladin."[491] He provided the following additional information that Abu Zubaydah: (1) was considered the financial officer; (2) handled the "fraudulent" operations; (3) was considered to be responsible for the Gulf networks; and (4) was considered to be experienced in military affairs.[492] [redacted] also admitted to meeting with Abu Zubaydah at least twice.[493] An intelligence cable indicates that "as of 2 October 2001, [[redacted]] had retracted his previous admissions . . . to carry out a terrorist attack against the U.S. embassy . . . ."[494] [redacted] were certain, however, that despite [redacted] retraction of his admissions concerning a plot against a U.S. embassy, he was involved in terrorist planning activity against unknown targets. They also assessed that [redacted] had not been previously aware of the September 11, 2001, terrorist attacks by al-Qa'ida when he made his earlier admissions related to Abu Zubaydah.[495]

~~(TS~~[redacted]~~NF)~~ [redacted] further "denied that he ever met [Abu Zubaydah]" and "also denied any affiliation" with al-Qa'ida.[496] Given the level of detail [redacted] provided about Abu Zubaydah, including Abu Zubaydah's rank within al-Qa'ida, his denials of meeting with Abu Zubaydah do not ring true. Moreover, Abu Zubaydah himself admitted to at least one meeting with [redacted], which undermines the [redacted] denials about such meetings.[497] Based on this information, we are not so quick to dismiss the validity of [redacted] original assessments of Abu Zubaydah's stature within al-Qa'ida, especially since the timing of his recantation [redacted]

~~(TS~~[redacted]~~NF)~~ The Study cites to a finished intelligence product entitled, *Countering Misconceptions About Training Camps in Afghanistan, 1990-2001,* as support for its stunning claim that Abu Zubaydah was not a member of al-Qa'ida. In a text box, this intelligence product makes the following assertions:

> A common misperception in outside articles is that Khaldan camp was run by al-Qa'ida. Pre-911 September 2001 reporting miscast Abu Zubaydah as a "senior al-Qa'ida lieutenant," which led to the inference that the Khaldan camp he was administering was tied to Usama Bin Ladin . . . .

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[489] *See* CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 32.
[490] CIA, ALEC [redacted]
[491] CIA, CIA [redacted]
[492] CIA, CIA [redacted]
[493] CIA, CIA [redacted]
[494] CIA, CIA [redacted] *See also* CIA, ALEC [redacted]
[495] *See* CIA, CIA [redacted]
[496] *See* CIA, CIA [redacted]
[497] CIA, ALEC [redacted] CIA, ALEC [redacted] Abu Zubaydah and [redacted] accounts differ as to the location of this meeting(s).

> Al-Qa'ida rejected Abu Zubaydah's request ***in 1993*** to join the group and that Khaldan was not overseen by Bin Ladin's organization.[498]

At best, this text supports the rather useless assertion that in August 2006, a CIA intelligence product stated that *Abu Zubaydah was not a member of al-Qa'ida in 1993*—not the Study's erroneous claim that the CIA later concluded in 2006 that "Abu Zubaydah was not a member of al-Qa'ida." This misrepresentation of the actual text is another example of poor analytical tradecraft by the Study. As previously noted, there were multiple threads of intelligence demonstrating Abu Zubaydah's leadership role in al-Qa'ida prior to September 11, 2001.[499] Moreover, by the Study's own count, the interrogations of Abu Zubaydah resulted in 766 sole-source disseminated intelligence reports.[500] There should be absolutely no doubt in the Study that Abu Zubaydah was a senior and very-well informed member of al-Qa'ida.

(U) *Breadth of Application of Enhanced Interrogation Techniques*

Study Claim: (~~TS~~[redacted]~~NF~~) **"[T]he CIA applied its enhanced interrogation techniques to numerous other CIA detainees without seeking additional formal legal advice from the OLC."[501]**

Fact: (~~TS~~[redacted]~~NF~~) **The CIA appropriately applied the legal principles of the August 1, 2002, OLC memorandum to other CIA detainees.**

(~~TS~~[redacted]~~NF~~) The Study authors appear to misunderstand the role of the OLC. The OLC does not exercise line management responsibility for CIA organizations, nor is it responsible for day-to-day legal advice to the agency. The OLC does provide legal analysis on specific questions of law applicable to a defined set of facts. The CIA then applies the OLC's guidance to similar scenarios under the guidance of its own legal counsel. The fact that the CIA felt comfortable enough with OLC's August 1, 2002, legal opinion to apply the same legal principles to other detainees does not constitute an impediment to DOJ's legal analysis of the Program. In fact, the Attorney General later expressed the view that "the legal principles reflected in DOJ's specific original advice could appropriately be extended to allow use of the same approved techniques (under the same conditions and subject to the same safeguards) to other individuals besides the subject of DOJ's specific original advice."[502]

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[498] CIA, *Countering Misconceptions About Training Camps in Afghanistan, 1990-2001,* August 16, 2006, p. 2 (emphasis added).

[499] *See* CIA Study Response, *Conclusions (TAB B),* June 27, 2013, p. 32.

[500] SSCI Study, Volume III, March 31, 2014, pp. 282-283.

[501] SSCI Study, Executive Summary, December 3, 2014, p. 411.

[502] *See* Memorandum from Jack Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to John Helgerson, Inspector General, Central Intelligence Agency, June 18, 2004, Addendum, p. 2 (DTS 2004-2730).

(U) *Detainees' Importance Overstated*

Study Claim: **~~(TS~~[redacted]~~NF)~~ The CIA made inaccurate representations to DOJ that Janat Gul and Ahmed Khalfan Ghailani were high-value al Qaeda operatives with knowledge of a pre-election plot against the United States when seeking legal guidance on whether the use of four additional interrogation techniques might violate U.S. law or treaty obligations.**[503]

~~(TS~~[redacted]~~NF)~~ "[T]he threat of a terrorist attack to precede the November 2004 U.S. election was found to be based on a CIA source whose information was questioned by senior CTC officials at the time and who admitted to fabricating the information after a [redacted] in [redacted] October 2004."[504]

Fact: **~~(TS~~[redacted]~~NF)~~ Contrary to the Study's claim, the CIA believed the representations to be true at the time it made them to the OLC. The CIA did not learn that some of these representations had been fabricated by a sensitive CIA source until months *after* OLC had approved the use of enhanced interrogation techniques against Janat Gul and Ahmed Khalfan Ghailani.**

~~(TS~~[redacted]~~NF)~~ The email relied upon by the Study does not support the proposition that senior CTC officials questioned the veracity of the sensitive CIA source. Also, while the source did admit to fabricating information about a meeting that never occurred, the Study does not acknowledge that the Chief of Base believed that the source was "generally truthful" about his discussions on the pre-election threat, despite [redacted] result on that issue.

~~(TS~~[redacted]~~NF)~~ The Study notes that the August 26, 2004, OLC letter advising that the use of four particular interrogation techniques on Janat Gul outside of the United States would not violate U.S. law or treaty obligations was based on the understanding that Janat Gul is a "high-value al Qaeda operative who is believed to possess information concerning an imminent terrorist threat to the United States."[505] The Study also notes that the September 6, 2004, OLC letter advising that the use of twelve particular interrogation techniques outside of the United States on Ahmed Khalfan Ghailani would not violate U.S. law or treaty obligations was based on the understanding that "Ghailani is an al-Qa'ida operative who 'is believed to be involved in the operational planning of an al-Qa'ida attack or attacks to take place in the United states prior to the November elections.'"[506] With the benefit of faulty hindsight, the Study claims that these representations were inaccurate.[507]

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[503] *See* SSCI Study, Executive Summary, December 3, 2014, pp. 417-418.

[504] SSCI Study, Executive Summary, December 3, 2014, p. 417.

[505] DOJ, Letter from Dan Levin, Acting Assistant Attorney General, to John A. Rizzo, Acting General Counsel, August 26, 2004, p. 1; SSCI Study, Executive Summary, December 3, 2014, p. 417.

~~(TS~~[redacted]~~NF)~~ This claim gives the false impression that the CIA intentionally withheld information from OLC about known fabrications from a questionable source. The truth is that the sensitive CIA source did not recant some of the underlying threat information that was contained in the CIA representations until October[redacted]and[redacted] 2004, *40 days after the issuance of the OLC letter for Gul and 29 days after the issuance of OLC letter for Ghailani.* Thus, the CIA made its August and September representations to OLC in good faith, believing them to be accurate.

~~(TS~~[redacted]~~NF)~~ Moreover, the authorities cited by the Study do not fully support its claim that the CIA source's representations about the pre-election threat were inaccurate.[508] Specifically, the cited email does not question the credibility of the sources who provided the threat information in March 2004; and the cable reporting the fabrication by one of these sources in October 2004 clearly indicates that some of the source's pre-election threat information was considered to be "generally truthful."

~~(TS~~[redacted]~~NF)~~ As the subject of the email implies—"Re: could AQ be testing ASSET Y and [source name REDACTED]?"—the concerns raised were not about the credibility of the sources, but more about the possibility that al-Qa'ida might be using this threat information to test the sources who had provided the pre-election threat information. The email raising the concern specifically states, "this is not to say that either ASSET Y or [source name REDACTED] are wrong or that the AQ statement below[509] is anything more than disinformation."[510] The reply email stated that it was possible the sources were just hearing the same rumors, but recollected that when al-Qa'ida put out similar rumors in the summer of 2001, those turned out to be true.[511] These emails do not support any inference about early suspicions of the source's credibility nor do they dismiss the legitimacy of the threat information provided by the sources.

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[506] DOJ, Letter from Dan Levin, Acting Assistant Attorney General, to John A. Rizzo, Acting General Counsel, September 6, 2004, p. 1; SSCI Study, Executive Summary, December 3, 2014, p. 417-418.

[507] SSCI Study, Executive Summary, December 3, 2014, p. 417.

[508] *See* SSCI Study, Executive Summary, December 3, 2014, p. 417.

[509] The referenced statement was issued by al-Qa'ida on March 17, 2004, and asserted that al-Qa'ida would not operate any large-scale operation prior to the election.

[510] Email from: [redacted]; to: [redacted], [redacted], [REDACTED], [redacted], [redacted]; subject: could AQ be testing [ASSET Y[redacted] and [source name REDACTED]?; date: March[redacted], 2004, at 06:55 AM; Email from: [redacted]; to [redacted]; cc: [redacted], [redacted], [REDACTED], [redacted]; subject: Re: could AQ be testing [the source] and[redacted]?; date: March [redacted], 2004, at 7:52:32 AM, p. 1 (footnote added).

[511] Email from[redacted]to[redacted]REDACTED[redacted] subject: could AQ be testing [ASSET Y] and[source name REDACTED]?; [redacted]ate: March[redacted] 2004, at 06:55 AM; Email from[redacted] [REDACTED], [redacted]subject: Re: could AQ be testing [the source] and [redacted]; date: March[redacted]2004, at 7:52:32 AM, p. 1 (footnote added). This email confirms that the sensitive source who subsequently admitted to fabricating information was not the only source providing information related to a possible pre-election terrorist threat. [redacted].

~~(TS~~[redacted]~~NF)~~ The Study states that [redacted] indicated that ASSET Y was "deceptive in response to questions regarding . . . the pre-election threat."[512] This assertion is not entirely accurate. In fact, the cited cable indicated that the source [redacted] on the issue of the pre-election threat [redacted]."[513] Moreover, the assessment paragraph in the cited cable states: "Based on ASSET Y's seemingly genuine concern and constant return to the issue, COB believes that ASSET Y is being generally truthful about his discussions . . . on the pre-election threat."[514]

(U) *Effectiveness of the Program*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **The CIA's "representations of 'effectiveness' were almost entirely inaccurate and mirrored other inaccurate information provided to the White House, Congress, and the CIA inspector general."[515]**

Fact: ~~(TS~~[redacted]~~NF)~~ **The CIA's Detention and Interrogation Program, to include the use of enhanced interrogation techniques, was effective and yielded valuable intelligence. The Study's exaggerated and absolute claims about inaccurate "effectiveness" representations by the CIA have been largely discredited by these minority views and the CIA's June 27, 2013, response to the Study.**

~~(TS~~[redacted]~~NF)~~ In our view, the CIA's June 27, 2013, response to the Study identified significant problems with the original Study approved by the SSCI during the 112th Congress. Their response also fairly addressed the Study's many allegations of inaccurate representations in the context of the effectiveness of the Detention and Interrogation Program. For the most part, we found that the CIA acknowledged those representations that were made in error or could have benefited from the inclusion of additional clarification.

~~(TS~~[redacted]~~NF)~~ As previously discussed, our own review of the documentary record in response to these serious allegations against the CIA found that many of the Study's claims of alleged misrepresentations were themselves inaccurate. As a reminder of these inaccurate Study claims, we provide the following sampling of our findings related to the CIA's effectiveness representations: (1) "There is considerable evidence that the information Abu Zubaydah provided identifying KSM as 'Mukhtar' and the mastermind of 9/11 was significant to CIA analysts, operators, and FBI interrogators";[516] (2) "CIA records clearly indicate that sleep deprivation played a significant role in Abu Zubaydah's identification of Jose Padilla as an al-Qa'ida operative tasked to carry out an attack against the United States";[517] (3) "Abu Zubaydah provided information about how he would go about locating Hassan Ghul and other al-Qa'ida associates in Karachi. This information caused [redacted] Pakistani authorities to intensify their efforts and helped lead them to capture Ramzi bin al-Shibh and other al-Qa'ida associates during the Karachi safe house raids conducted on September 10-11, 2002";[518] (4) "Information produced through detainee interrogation was pivotal to the retention of a key CIA asset whose cooperation led directly to the capture of KSM";[519] (5) "CIA documents show that key intelligence collected through the CIA's Detention and Interrogation Program, including information obtained after the use of enhanced interrogation techniques, played a major role in disrupting the Karachi hotels bombing plot";[520] (6) "The CIA interrogation program played a key role in disrupting the Heathrow and Canary Wharf plotting";[521] (7) "CIA documents show that the interrogation of KSM and al-Qa'ida operative Zubair, during and after the use of enhanced interrogation techniques on both individuals, played a key role in the capture of Hambali";[522] (8) "The CIA interrogation program played a key role in disrupting the "Second Wave" plot and led to the capture of the 17-member al-Ghuraba group";[523] (9) "CIA, FBI, and Department of Justice documents show that information obtained from detainees in CIA custody was important to identifying Ja'far al-Tayyar";[524] (10) "KSM provided valuable intelligence that helped to clarify Saleh al-Marri's role in al Qa'ida operations";[525] (11) "CIA, FBI, and Department of Justice documents show that information obtained from KSM after he was waterboarded led directly to Faris's arrest and was key in his prosecution"[526] (12) "Information obtained from detainee reporting, particularly KSM, provided otherwise unavailable intelligence that led to the identification of Saifullah Paracha as an al-Qa'ida operative involved in a potential plot, which spurred FBI action against him and his son, Uzhair";[527] (13) "Representations about the thwarting of an attack against Camp Lemonier in Djibouti, specifically President Bush's 2006 comments that 'Terrorists held in CIA custody have also provided information that helped stop a planned strike on U.S. Marines at Camp Lemonier in Djibouti,' were accurate and have been mischaracterized by the Study";[528] and (14) "CIA documents show that detainee information served as the "tip-off" and played a significant role in leading CIA analysts to the courier Abu Ahmad al-Kuwaiti. While there was other information in CIA databases about al-Kuwaiti, this information was not recognized as important by analysts until after detainees provided information on him."[529]

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[512] SSCI Study, Executive Summary, December 3, 2014, p. 348.
[513] CIA, CIA CABLE 1411, [redacted] 2004, p. 4.
[514] CIA, CIA CABLE 1411, [redacted] 2004, p. 5.
[515] SSCI Study, Executive Summary, December 3, 2014, p. 426.
[516] *See supra*, pp. 29-31.
[517] *See supra*, pp. 33-36.

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[518] *See supra*, pp. 37-41.
[519] *See supra*, pp. 41-45.
[520] *See supra*, pp. 45-47.
[521] *See supra*, pp. 47-50.
[522] *See supra*, pp. 50-53.
[523] *See supra*, pp. 53-56.
[524] *See supra*, pp. 56-57.
[525] *See supra*, pp. 57-58.
[526] *See supra*, pp. 58-61.
[527] *See supra*, pp. 61-64.
[528] *See supra*, pp. 67-68.
[529] *See supra*, pp. 73-75.

(U) *Use of Constant Light, White Noise, and Shaving of Detainees*

Study Claim: ~~(TS~~[redacted]~~NF)~~ **CIA assertions to the OLC that loud music and white noise, constant light, and 24-hour shackling were all for security purposes were inaccurate.**[530]

Fact: ~~(TS~~[redacted]~~NF)~~ **The CIA disclosed to OLC that these confinement conditions were both for security and for other purposes.**

~~(TS~~[redacted]~~NF)~~ The Study asserts that the CIA inaccurately represented its purpose for confining detainees in conditions including loud music, white noise, constant light, 24-hour shackling, and shaving of the head and face.[531] The CIA's response asserts that this characterization takes the CIA's representations out of context. The Agency claimed that such conditions were necessary for security, not that the mechanisms served no other purpose. The Agency noted that in responding to a draft OLC opinion, the CIA tried to correct the misunderstanding, noting that "these conditions are also used for other valid reasons, such as to create an environment conducive to transitioning captured and resistant terrorist to detainees participating in debriefings."[532]

(U) Conclusion 9 (CIA Impeded Oversight by CIA Office of Inspector General)

(U) Conclusion 9 states, "[t]he CIA impeded oversight by the CIA's Office of Inspector General."[533] This allegation is among the most serious charges the Study levels against the CIA. As such, the Study should back up this charge with clear and convincing evidence. In our opinion it not only fails in that effort, but the Study itself is replete with examples that lead to the opposite conclusion—that the CIA did not significantly impede oversight by the CIA Office of the Inspector General (OIG).

(U) The law requires the CIA Inspector General to certify that "the Inspector General has had full and direct access to all information relevant to the performance of his function."[534] If the CIA OIG had been impeded in its oversight related to the CIA's Detention and Interrogation Program, it would have had to report that it was unable to make the required certification with respect to its oversight of this program. Yet, during the timeframe of the Program, the Inspector General certified in every one of its semiannual reports that it had "full and direct access to all CIA information relevant to the performance of its oversight duties."[535] The law also requires the Inspector General to *immediately* report to the congressional intelligence committees if the Inspector General is "unable to obtain significant documentary information in the course of an investigation, inspection or audit . . . ."[536] Again, we are not aware of any such report being made to the SSCI during the relevant time period. We do know, however, that John Helgerson, the CIA Inspector General, testified before SSCI prior to the commencement of the SSCI's review of the CIA Detention and Interrogation Program in February 2007 and did not complain of access to Agency information.[537] Instead, he said that, during 2006, the IG took a comprehensive look at the operations of the CIA's Counterterrorism Center and conducted a separate, comprehensive audit of detention facilities. General Helgerson also testified,

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[530] SSCI Study, Executive Summary, December 3, 2014, pp. 428-429.

[531] SSCI Study, Executive Summary, December 3, 2014, pp. 428-429.

[532] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 34.

[533] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.

[534] 50 U.S.C. 3517(d)(1)(D).

[535] *See* CIA OIG, *Semi-Annual Report to the Director, Central Intelligence Agency*, July-December 2006, p. 5 (DTS 2007-0669); CIA OIG, *Semi-Annual Report to the Director, Central Intelligence Agency*, January-June 2006, p. 5 (DTS 2006-3195); CIA OIG, *Semi-Annual Report to the Director, Central Intelligence Agency*, July-December 2005, p. 5 (DTS 2006-0678); CIA OIG, *Semi-Annual Report to the Director, Central Intelligence Agency*, January-June 2005, p. 5 (DTS 2005-3140); CIA OIG, *Semi-Annual Report to the Director of Central Intelligence*, January-June 2004, p. 5 (DTS 2004-3307); and CIA OIG, *Semi-Annual Report to the Director of Central Intelligence*,

> [W]e look carefully at ***all*** cases of alleged abuse of detainees. The first paper of this kind that came to the Committee was in October 2003, not long after these programs had begun, when we looked at allegations of unauthorized interrogation techniques used at one of our facilities. It proved that indeed unauthorized techniques had been used. I'm happy to say that the processes worked properly. An Accountability Board was held. The individuals were in fact disciplined. The system worked as it should.
>
> On this subject, Mr. Chairman, I cannot but underscore that we also look at a fair number of cases where, at the end of the day, we find that we cannot find that there was substance to the allegation that came to our attention. We, of course, make careful record of these investigations because we think it important that you and others know that we investigate all allegations, some of which are borne out, some of which are not.[538]

Thus, the allegation made by this conclusion is attacking the credibility and integrity of both the CIA OIG and the CIA. Issues of credibility and integrity can rarely be resolved by resorting to a documentary record alone. They are best resolved by personally interviewing and assessing the performance of relevant witnesses, which, with some limited exceptions, was not done during the course of this Study. The absence of evidence relating to these statutory reporting requirements is a strong indicator the CIA OIG was not impeded in its oversight of the CIA's Detention and Interrogation Program.

(U) Another possible indicator of impeded oversight would be evidence that the CIA OIG was blocked from conducting or completing its desired reviews of the program. If such oversight had been impeded, we would expect to see few, if any, completed investigations, reviews, or audits of the Program. Instead, it appears that the opposite took place. The Study itself acknowledges the existence of at least 29 OIG investigations on detainee-related issues,

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January-June 2003, p. 5 (DTS 2003-3327); CIA Study Response, *Comments (TAB A)*, June 27, 2013, pp. 4-6; and 10; and CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, pp. 7-9.

[536] 50 U.S.C. 3517(d)(3)(E).

[537] *See* SSCI Transcript, *Hearing on the Central Intelligence Agency Rendition Program,* February 14, 2007, p. 24 (DTS 2007-1337).

[538] SSCI Transcript, *Hearing on the Central Intelligence Agency Rendition Program,* February 14, 2007, p. 25 (DTS 2007-1337) (emphasis added).

including 23 that were open or had been completed in 2005.[539] We would also expect to see indications in completed OIG reports that the investigation was hampered by limited access to documents, personnel, or site locations necessary for completing such investigations. Again, according to the OIG's own reports, we found evidence that the OIG had extensive access to documents, personnel, and locations. For example, in its May 2004 Special Review of the RDI program, the CIA OIG reported that it was provided more than 38,000 pages of documents and conducted more than 100 interviews, including with the DCI, the Deputy Director of the CIA, the Executive Director, the General Counsel, and the Deputy Director of Operations. The OIG made site visits to two interrogation facilities [redacted] and reviewed 92 videotapes of the interrogation of Abu Zubaydah. The CIA IG's 2006 Audit is another good example of extensive access to documents, personnel, and locations. During this audit, the OIG not only conducted interviews of current and former officials responsible for CIA-controlled detention facilities, but it also reviewed operational cable traffic in extremely restricted access databases, reports, other Agency documents, policies, standard operating procedures, and guidelines pertaining to the detention program. The OIG also had access to the facilities and officials responsible for managing and operating three detention sites. The OIG was able to review documentation on site, observe detainees through closed-circuit television or one-way mirrors, and the IG even observed the transfer of a detainee aboard a transport aircraft. They even reviewed the medical and operational files maintained on each detainee in those locations.[540]

(U) The Study's case in support of this conclusion seems to rest mainly upon the following four observations: (1) the CIA did not inform the CIA OIG of the existence of the Program until November 2002; (2) some CIA employees provided the OIG with some inaccurate information about the Program; (3) CIA Director Goss directed the Inspector General in 2005 not to initiate planned review of the Program until the reviews already underway were completed; and (4) Director Hayden ordered a review of the OIG itself in 2007.[541] Our examination of these observations supports our conclusion that the CIA OIG was not impeded in its oversight of the CIA's Detention and Interrogation Program.

(U) The Study seems to fault the CIA for not briefing the CIA Inspector General on the existence of the Detention and Interrogation Program until November 2002, but does not really pursue why this fact alone was a problem or how it actually "impeded" the CIA OIG. Acting under the authority of the President's September 17, 2001, Memorandum of Notification, the CIA initiated the Program in late-March, 2002, when the first detainee was taken into its custody.[542] The CIA's Detention and Interrogation Program was part of a highly classified and compartmented covert action program. As the Program was being implemented, the CIA sought legal guidance from the Department of Justice and began briefing the White House.[543] Congressional access to details about the Program was restricted to leadership of the congressional intelligence committees during that same timeframe.[544] The CIA Inspector General was notified in November about the Program's existence in November 2002, because of the need for an OIG investigation into the death of a detainee who had been in the custody of the CIA.[545] At that point, the OIG had a clear "need to know" about the Program. We see nothing sinister in these events.

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[539] SSCI Study, Volume I, March 31, 2014, p. 899 n.6257. The CIA asserts that the "OIG conducted nearly 60 investigations" related to the CIA's Detention and Interrogation Program and that the OIG found the initial allegations in 50 of these investigations to be unsubstantiated or did not make findings warranting an accountability review. Of the remaining 10 investigations, one resulted in a felony conviction, one resulted in the termination of a contractor and the revocation of his security clearances, and six led to Agency accountability reviews. CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 7.

[540] CIA OIG, *CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification*, July 14, 2006, APPENDIX A, pp. 1-2 (DTS 2006-2793).

[541] SSCI Study, Findings and Conclusions, April 3, 2014, p. 8. [[This factual error and misrepresentation of events was corrected in the December 3, 2014, version of the Findings and Conclusions by editing the text to read, "In 2005, CIA Director Goss *requested* in writing that the inspector general not initiate further reviews of the CIA's Detention and Interrogation Program until review already underway were completed." (emphasis added). *Compare* SSCI Study, Findings and Conclusions, April 3, 2014, p. 8 *with* SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.]]

(U) The second "impeding" observation concerned the fact that CIA personnel provided the OIG with inaccurate information on the operation and management of the Detention and Interrogation Program, which was subsequently not corrected by the CIA and was included in the OIG's final report. The CIA has acknowledged in two cases that it made "mistakes that caused the IG to incorrectly describe in its 2004 *Special Review* the precise role that information acquired from KSM played in the detention of two terrorists involved in plots against targets in the [United States]."[546] The inclusion of erroneous information in an oversight report is disappointing, but absolute precision in matters such as these is rarely obtainable. Overall, these errors did not fundamentally alter the overall representations the CIA made about the RDI program to the OIG and policy makers.

(U) The Study's third observation about CIA Director Goss contains an error. It states that in 2005, "CIA Director Goss *directed* the Inspector General not to initiate planned reviews of the CIA Detention and Interrogation Program until reviews already underway were completed."[547] In fact, Director Goss did not "direct," but rather asked that a newly proposed review by the OIG be rescheduled until a mutually agreed-upon date. We find that the actual text from Director Goss's request provides sufficient justification against any allegation of "impeding" OIG oversight with the respect to the timing of the proposed OIG review. The memorandum states:

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[542] *See* CIA, ALEC [redacted]

[543] *See* CIA OIG, *Special Review: Counterterrorism Detention and Interrogation Activities, (September 2001 – October 2003)*, May 7, 2004, p. 4 (DTS 2004-2710).

[544] The CIA briefed HPSCI leadership on September 4, 2002, shortly after the August recess. SSCI leadership was briefed on the Program on September 27, 2002. *See* CIA Study Response, *Conclusions,* June 27, 2013, p. 36.

[545] CIA OIG, *Special Review: Counterterrorism Detention and Interrogation Activities, (September 2001 – October 2003),* May 7, 2004, p. 52 (DTS 2004-2710).

[546] CIA Study Response, *Conclusions (TAB B),* June 27, 2013, p. 22 (emphasis in original).

[547] SSCI Study, Findings and Conclusions, April 3, 2014, p. 8 (emphasis added). [[This factual error and misrepresentation of events was corrected in the December 3, 2014, version of the Findings and Conclusions by editing the text to read, "In 2005, CIA Director Goss *requested* in writing that the inspector general not initiate further reviews of the CIA's Detention and Interrogation Program until review already underway were completed." (emphasis added). *Compare* SSCI Study, Findings and Conclusions, April 3, 2014, p. 8 *with* SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.]]

> Given its mission, CTC unquestionably must be subjected to rigorous independent oversight. This, in fact, has been the case, as evidenced by the 20 or so ongoing, incomplete OIG reviews directed at the Center. I am increasingly concerned about the cumulative impact of the OIG's work on CTC's performance. As I have said in previous correspondence to you, I believe it makes sense to complete existing reviews, particularly resource-intensive investigations such as those now impacting CTC, before opening new ones. As CIA continues to wage battle in the Global War on Terrorism, I *ask* that you reschedule these aspects of the new CTC review until a mutually agreeable time in the future.[548]

(U) The final observation in support of this "impeding" conclusion was that CIA Director Michael Hayden ordered a review of the OIG itself in 2007. The law governing the CIA OIG states, "The Inspector General shall report directly to and be under the general supervision of the Director."[549] Director Hayden's request for this review stemmed from a disagreement between the Office of the General Counsel (OGC) and the OIG over a legal interpretation related to the CIA's Detention and Interrogation Program. Director Hayden tasked Special Counselor Robert Dietz to assess how OGC and OIG interacted on legal issues. He also subsequently tasked Dietz with reviewing complaints of alleged OIG bias and unfair treatment of CIA officers as part of this review. On October 24, 2007, Deitz and his review team made an oral presentation to the Inspector General and his senior staff. They presented a number of recommendations regarding modifications to the OIG's procedures and practices, a number of which were adopted by the Inspector General. Director Hayden subsequently sent a message to the CIA workforce, stating that the Inspector General had "chosen to take a number of steps to heighten the efficiency, assure the quality, and increase the transparency of the investigative process." Director Hayden's message listed the agreed-upon recommendations.[550] Rather than impeding the CIA OIG's oversight, it appears that Director Hayden's order resulted in agreed-upon improvements to that office.

(U) We find that these observations, whether considered individually or in combination, do not support the conclusion that the CIA improperly impeded oversight of the CIA's Detention and Interrogation Program by the CIA OIG.

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[548] CIA, Memorandum from Porter J. Goss, Director, Central Intelligence Agency to CIA Inspector General, re: *New IG Work Impacting the CounterTerrorism Center*, July 21, 2005 (emphasis added). In this same memorandum, Director Goss did exercise his statutory authority to direct the Inspector General to stand down from talking directly with high-value detainees until he received a compelling explanation. Ibid., p. 1. *See* 50 U.S.C. 403q. A few days later, a compromise was reached that permitted the audit of the CIA black sites with the agreement that no high value detainees would be interviewed by the OIG during the audit. *See* July 28, 2005, 08:54 AM, email from [REDACTED], DCI/OIG/Audit Staff/Operations Division to: [REDACTED] cc: [redacted] [REDACTED], [REDACTED], [REDACTED], [REDACTED], Robert Grenier, [redacted], [REDACTED], John P. Mudd, [REDACTED], [REDACTED], CIA attorney, CIA attorney, [REDACTED], [REDACTED]Re: Request for TDY Support; CIA OIG, *CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification*, July 14, 2006, Appendix A, p. 3 (DTS 2006-2793). Director Goss's lawful exercise of his statutory authority cannot be labeled as "impeding" oversight, especially here, where a reasonable accommodation was reached within a matter of days.

[549] 50 U.S.C. 403q.

[550] *See* Letter from DCIA Michael Hayden to Senator John D. Rockefeller, January 29, 2008 (DTS 2012-0606).

(U) Conclusion 10 (The CIA Released Classified Information on EITs to the Media)

(U) Conclusion 10 asserts, "[t]he CIA coordinated the release of classified information to the media, including inaccurate information concerning the effectiveness of the CIA's enhanced interrogation techniques."[551] This conclusion insinuates that there was something improper about the manner in which the CIA managed the process by which information about the Detention and Interrogation Program was disclosed to the media. It also repeats one of its main faulty claims—that the CIA released inaccurate information about the Program's effectiveness. Our examination of the record revealed that the CIA's disclosures were authorized and that the CIA's representations about the Program were largely accurate.

Study Claim: ~~(TS~~[redacted]~~NF)~~ **"The CIA's Office of Public Affairs and senior CIA officials coordinated to share classified information on the CIA's Detention and Interrogation Program to select members of the media to counter public criticism, shape public opinion, and avoid potential congressional action to restrict the CIA's detention and interrogation authorities and budget. These disclosures occurred when the program was a classified covert action program and before the CIA had briefed the full Committee membership on the program."[552]**

Fact: **(U) The National Security Council Policy Coordinating Committee designated the CIA as "the lead" on the "Public Diplomacy issue regarding detainees."**

(U) The Study seems to confuse the difference between an authorized disclosure of classified information and the unauthorized "leak" of that same information. Despite acknowledging that the "National Security Council Principals Committee discussed a public campaign for the CIA's Detention and Interrogation Program,[553] the Study tries to cast the authorized disclosures as a "media campaign" that must be "done cleverly,"[554] and dwells on CIA officers providing information on the Program to journalists.[555] Specifically, on April 15, 2005, the National Security Council (NSC) Policy Coordinating Committee (PCC) determined that the CIA would have "the lead" on the "Public Diplomacy issue regarding detainees."[556] Once the PCC designated CIA as "the lead" on this matter, the CIA was authorized to make determinations on what information related to this highly classified covert action could be disclosed to the public on a case-by-case basis, without having to return to the White House for subsequent approvals.

(U) The White House did, however, retain its authority with respect to protecting sources and methods in the context of keeping the congressional intelligence fully and currently informed of this particular covert action. It is within the President's discretion to determine which members of Congress beyond the "gang of eight," are briefed on sensitive covert action programs. There is no requirement for the White House to brief the full Committee as a prerequisite to the declassification or disclosure of information to the media.

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[551] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[552] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.
[553] SSCI Study, Executive Summary, December 3, 2014, p. 403.
[554] SSCI Study, Volume II, April 1, 2014, pp. 1521-1522.
[555] SSCI Study, Executive Summary, December 3, 2014, pp. 403-404.
[556] Email from: [redacted]; to: CIA attorney; subject: Brokaw interview: Take one; date: April 15, 2005, at 1:00 PM.

(U) The Study acknowledges the White House's guiding influence on opening aspects of the Program to public scrutiny[557] in a section entitled, "NSC Principals Agree to Public Campaign Defending the CIA Detention and Interrogation Program."[558] In a subsequent section, referring to another "media plan," the Study states, "In the fall of 2005, the CIA expanded on its draft public briefing document. One draft, dated November 8, 2005, was specifically intended for National Security Advisor Stephen Hadley, who had requested it."[559] Later, "[t]hroughout the summer of 2006, the CIA assisted the White House in preparing the public roll-out of the program, culminating in President Bush's September 6, 2006 speech describing specific intelligence obtained from CIA detainees."[560] The Study cites no examples of the White House objecting to CIA activities that followed from these discussions.

(U) The Study is correct that, "The CIA's Office of Public Affairs and senior CIA officials coordinated to share classified information on the CIA's Detention and Interrogation Program to select members of the media."[561] That is the function of the Office of Public Affairs (OPA), which is the CIA office primarily responsible for dealing with the routine daily inquiries from the media. The CIA response to the Study indicates that the "vast majority of CIA's engagement with the media on the program was the result of queries from reporters seeking Agency comment on information they had obtained *elsewhere.*[562] The Study made no effort to review established procedures at OPA. The OPA's guidelines and practices include coordinating any information with "senior CIA officials," in order to mitigate or limit the disclosure of classified information. The OPA responds to media requests in a variety of ways that range from "no comment," to, in some cases, working with the media to provide context and improve the accuracy of stories that do not damage the CIA's equities.

(U) The Study cites a few select examples of media inquiries that resulted in stories about the Detention and Interrogation Program. The Study does not make clear, in most cases, who initiated these requests, nor does the Study make clear in what way their selected examples represent the body of media exchanges that OPA had with the media during the period of the Program. Interviews with OPA personnel would have rendered some clarity on these questions.

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[557] DECISION PAPER: Background for 10 March Principals Committee Meeting on Long-Term Disposition of Selected High Value Detainees, March 4, 2005. *See also* email from: [redacted] to Robert L. Grenier; cc: John P. Mudd, [redacted], [REDACTED], [redacted]; subject: DCI Briefing Material/Talking points for upcoming PC; date: 3/01/05 11:33 AM. SSCI Study, Volume II, April 1, 2004, pp. 1508-54.

[558] SSCI Study, Volume II, April 1, 2014, p. 1521.

[559] SSCI Study, Volume II, April 1, 2014, p. 1528.

[560] SSCI Study, Volume II, April 1, 2014, p. 1535.

[561] SSCI Study, Findings and Conclusions, December 3, 2014, p. 8.

[562] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 39 (emphasis in original).

(U) The Study quotes, inconclusively, emails with various CIA counsels on how to handle the protection of covert action equities against public revelations[563] and chat sessions between officers in CTC who were tasked to prepare and review talking points for an appearance by senior CIA officials on NBC Dateline with Tom Brokaw. Their exchanges include comments on the rhetorical context of the possible media discussion, ("we either get out and sell, or we get hammered . . . we either put out our story or get eaten. there is no middle ground").[564] As noted in the CIA response to the Study, "the informal comments of any one CIA officer do not constitute Agency policy with regard to media interactions."[565] One officer's speculation in a chat session about the risks of the Congress' reaction to unfavorable media coverage does not support the conclusion that the CIA shaped its public affairs strategy as a means to avoid congressional action. Moreover, the CIA refuted the suggestion that this chat session exchange related to the disclosure of classified information by stating that the NBC Dateline broadcast for which the officers were preparing, "contained no public disclosures of classified CIA information; indeed, *the RDI program was not discussed.*"[566]

Study Claim: ~~(TS~~[redacted]~~NF)~~ "Much of the information the CIA provided to the media on the operation of the CIA's Detention and Interrogation Program and the effectiveness of its enhanced interrogation techniques was inaccurate and was similar to the inaccurate information provided by the CIA to the Congress, the Department of Justice, and the White House."[567]

Fact: ~~(TS~~[redacted]~~NF)~~ The CIA's Detention and Interrogation Program, to include the use of enhanced interrogation techniques, was effective and yielded valuable intelligence. The Study's exaggerated and absolute claims about inaccurate "effectiveness" representations by the CIA have been largely discredited by these minority views and the CIA's June 27, 2013, response to the Study.

~~(TS~~[redacted]~~NF)~~ As previously discussed, our own review of the documentary record in response to the Study's serious allegations against the CIA found that many of these claims of alleged misrepresentations were themselves inaccurate. The Study's flawed analytical methodology cannot suppress the reality that the CIA's Detention and Interrogation Program set up an effective cycle of events whereby al-Qa'ida terrorists were removed from the battlefield, which had a disruptive effect on their current terrorist activities and often permitted the Intelligence Community to collect additional intelligence, which, in turn, often led back to the capture of more terrorists. We found, with a few limited exceptions, that the CIA generally did a good job in explaining the Program's accomplishments to policymakers. We will not repeat the listing of our specific effectiveness findings here.[568]

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[563] SSCI Study, Executive Summary, December 3, 2014, p. 403-405.

[564] CIA, Sametime communication, between John P. Mudd and [redacted] dated April 13, 2005, from 19:23:50 to 19:56:05.

[565] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 40.

[566] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 40 (emphasis in original).

[567] CIA Study Response, *Conclusions (TAB B)*, June 27, 2013, p. 9.

[568] That list may be found in the discussion of Conclusion 5 under the *Effectiveness of the Program* heading, *supra*, pp. 96-97.

(U) CONCLUSION

(U) The Study concludes that the CIA was unprepared to initiate a program of indefinite, clandestine detention using coercive interrogation techniques, something we found obvious, as no element of our government was immediately prepared to deal with the aftermath of what had happened on September 11, 2001. In reviewing the information the CIA provided for the Study, however, we were in awe of what the men and women of the CIA accomplished in their efforts to prevent another attack. The rendition, detention, and interrogation program they created, of which enhanced interrogation was only a small part, enabled a stream of collection and intelligence validation that was unprecedented. The most important capability this program provided had nothing to do with enhanced interrogation—it was the ability to hold and question terrorists, who, if released, would certainly return to the fight, but whose guilt would be difficult to establish in a criminal proceeding without compromising sensitive sources and methods. The CIA called the detention program a "crucial pillar of US counterterrorism efforts, aiding intelligence and law enforcement operations to capture additional terrorists, helping to thwart terrorist plots, and advancing our analysis of the al-Qa'ida target."[569] We agree. We have no doubt that the CIA's detention program saved lives and played a vital role in weakening al-Qa'ida while the Program was in operation. When asked about the value of detainee information and whether he missed the intelligence from it, one senior CIA operator [redacted] told members, "I miss it every day."[570] We understand why.

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[569] Detainee Reporting Pivotal for the War Against al-Qa'ida, June 1, 2005, p. i.

[570] [redacted] Chambliss, [redacted], conversation between SSCI members and CIA officers, [redacted]

(U) APPENDIX I: CIA, *Countering Misconceptions About Training Camps in Afghanistan, 1990-2001, August 16, 2006*

16 August 2006

Countering Misconceptions About Training Camps in Afghanistan, 1990-2001 [redacted]

- Arab mujahidin took courses in explosives, electronics, and document falsification in private residences in Kabul where instructors charged fees of between $50 and $100 per month.

- A Moroccan guesthouse in Kabul provided target reconnaissance training primarily to Moroccans.

- One trainee received informal training on the placement, extraction, and camouflage of antitank and antipersonnel mines while on the frontlines in Bagram.[redacted]

The degree of al-Qa'ida involvement in the Afghanistan training scene during the 1990s is often overstated. Al-Qa'ida had only a peripheral role in training during the middle part of the decade when Bin Ladin and most of his group were located in Sudan.From 1993 to 1997, al-Faruq was used to train Tajiks with only a few al-Qa'ida members assisting. Al-Qa'ida reportedly was "in control of al-Faruq" again in 1997.

- Some of the camps have been misidentified as being run by al-Qa'ida, including Khaldan and Abu Khabab al-Masri's poisons-related facilities at Derunta and Kargha.

- Recent reporting suggests that the degree to which al-Qa'ida financed non–al-Qa'ida camps may have been exaggerated. For example, a senior al-Qa'ida leader reportedly said that he did not know of al-Qa'ida providing any money, material, or trainers to non–al-Qa'ida camps.[redacted]

By the late 1990s, al-Qa'ida—with the assistance of the Taliban—sought to gain hegemony over training in Afghanistan, but the group never controlled all the camps.

Khaldan Not Affiliated With Al-Qa'ida[redacted]

A common misperception in outside articles is that Khaldan camp was run by al-Qa'ida. Pre–11 September 2001 reporting miscast Abu Zubaydah as a "senior al-Qa'ida lieutenant," which led to the inference that the Khaldan camp he was administering was tied to Usama Bin Ladin.

- The group's flagship camp, al-Faruq, reportedly was created in the late 1980s so that Bin Ladin's new organization could have a training infrastructure independent of 'Abdullah Azzam's Maktab al-Khidamat, the nongovernmental organization that supported Khaldan.

- Al-Qa'ida rejected Abu Zubaydah's request in 1993 to join the group and that Khaldan was not overseen by Bin Ladin's organization.

- There were relations between the al-Qa'ida camps and Khaldan. Trainees, particularly Saudis, who had finished basic training at Khaldan were referred to al-Qa'ida camps for advanced courses, and Khaldan staff observed al-Qa'ida training. The two groups, however, did not exchange trainers. [redacted]

- An al-Qa'ida facilitator reportedly said that in 1998 Bin Ladin began to pressure other Arabs to close their facilities because he wanted all the recruits sent to al-Qa'ida.

- Ibn al-Shaykh al-Libi initially foiled attempts to shut down Khaldan, but by April 2000 the camp had closed.

- The Libyan Islamic Fighting Group and Abu Mus'ab al-Suri were able to bribe or convince Taliban officials to allow them to continue operating their camps despite al-Qa'ida's pressure on the Taliban to close them.[redacted]

(U) APPENDIX II: CIA, *Briefing Notes on the Value of Detainee Reporting*, August 2005

Briefing Notes on the Value of Detainee Reporting

August 2005

I'm glad to speak to you today about the results we have seen from high and mid value detainee reporting, which since 9/11 has become a crucial pillar of US counterterrorism efforts. To get a sense for the importance of this reporting to CIA's overall collection effort, let me share some statistics with you:

- **Since we began the program in March 2002, detainees have produced over 6,000 disseminated intelligence reports.**

- **Approximately half of CTC's disseminated intelligence reporting in 2004 on al-Qa'ida came from CIA-held detainees.**

- For both warning and operational purposes, detainee reporting is disseminated broadly among US intelligence and law enforcement entities [redacted] ~~(S//NF)~~

For today's briefing, I'm going to highlight five key areas in which detainee reporting has played a critical role: **aiding intelligence and law enforcement operations to capture additional terrorists, helping to thwart terrorist plots, advancing our analysis of the al-Qa'ida target, illuminating other collection, and validating sources.** ~~(S//NF)~~

Capturing Other Terrorists

Detainees have given us a wealth of useful targeting information on al-Qa'ida members and associates. **Detainees have played some role—from identification of photos to providing initial lead and in depth targeting information—in nearly every capture of al-Qa'ida members and associates since 2002, including [redacted] detentions we assess as "key" because the individuals captured represented a significant threat to the United States or were playing leading roles in assisting al-Qa'ida.**

I have handed you graphics that tell the story of two such cases:

Unraveling Hambali's network. In March 2003, al-Qa'ida operations chief Khalid Shaykh Muhammad (KSM) provided information about an al-Qa`ida operative, Majid Khan, whom he was aware had recently been captured. KSM—possibly believing the detained operative was "talking"—admitted to having tasked Majid with delivering a large sum of money to individuals working for another senior al-Qa`ida associate.

- In an example of how information from one detainee can be used in debriefing another detainee in a "building block" process, Khan—confronted with KSM's

[redacted]

[redacted]

information about the money—acknowledged that he delivered the money to an operative named "Zubair" and provided Zubair's physical description and contact number. Based on that information, Zubair was captured in June 2003.

- During debriefings, Zubair revealed that he worked directly for Jemaah Islamiyah (JI) leader and al-Qa'ida's South Asia representative Hambali. Zubair provided information [redacted] and arrest Hambali.

- Next, KSM—when explicitly queried on the issue—identified Hambali's brother, 'Abd al-Hadi, as a prospective successor to Hambali. Information from multiple detainees, including KSM, narrowed down 'Abd al-Hadi's location and enabled his capture [redacted]

- Bringing the story full circle, 'Abd al-Hadi identified a cell of JI operatives—some of them pilots—whom Hambali had sent to Karachi for possible al-Qa'ida operations. When confronted with his brother's revelations, Hambali admitted that he was grooming members of the cell for US operations—at the behest of KSM—probably as part of KSM's plot to fly hijacked planes into the tallest building on the US West Coast. ~~(S/~~[redacted]~~NF)~~

The Arrest of Dhiren Barot (aka Issa al-Hindi). KSM also provided the first lead to an operative known as "Issa al-Hindi," while other detainees gave additional identifying information. KSM also provided the first lead to an operative known as "Issa al-Hindi," while other detainees gave additional identifying information. Issa was well known in jihadi circles because he penned a book about his time fighting in Kashmir under his "al-Hindi" *nom de guerre*; however, no one seemed to know his true name. In March 2004, our hunt for Issa intensified when we receive reporting about a possible attack against the US Homeland.

- [redacted] KSM positively identifies the photo as Issa al-Hindi, and we are able to identified through a new search mechanism a separate individual who had traveled to the United States with Issa prior to 9/11.

- Issa and his former traveling companion —who were arrested in 2004—appear to have been involved in plots in the UK. Moreover, in early 2004, Issa had briefed US targeting packages to al-Qa'ida senior leadership in Pakistan. Issa was well known in jihadi circles because he penned a book about his time fighting in Kashmir under his "al-Hindi" *nom de guerre*; it was only through police work coupled with detainee confirmation on his identity, that [redacted] were able to find him. ~~(S/~~[redacted]~~/NF~~[redacted]

In addition to these two prominent cases, a number of other significant captures have resulted thanks to detainee reporting. It is important to highlight that a number of these cases involve law enforcement's use of our detainee reporting:

- ***Arrest of key al-Qa'ida facilitator*** [redacted] In debriefings, KSM in March 2003 noted that he had created and used a specified e-mail account to communicate with senior [redacted] CIA then determined that KSM had been using this account actively in ongoing operational planning for an [redacted] threat, which KSM confirmed. Analysis of [redacted] e-mails after KSM's detention led to his being located and arrested on [redacted] 2003.

- ***Identifying the "other" shoe bomber.*** Leads provided by KSM in November 2003 led directly to the arrest of shoe bomber Richard Reid's one-time partner Sajid Badat in the UK. KSM had volunteered the existence of Badat—whom he knew as "Issa al-Pakistani"—as the operative who was slated to launch a simultaneous shoe bomb attack with Richard Reid in December 2001.

- ***Jose Padilla.*** After his capture in March 2002, Abu Zubaydah provided information leading to the identification of alleged al-Qa'ida operative Jose Padilla. Arrested by the FBI in 2002 as he arrived at O'Hare Airport in Chicago, he was transferred to military custody in Charleston, South Carolina, where he is currently being held. The FBI began participating in the military debriefings in March 2003, after KSM reported Padilla might know the true name of a US-bound al-Qa'ida operative known at the time only as Jafar al-Tayyar. Padilla confirmed Jafar's true name as Adnan El Shukrijumah.

- ***Iyman Faris.*** Soon after his arrest, KSM described an Ohio-based truck driver whom the FBI identified as Iyman Faris, already under suspicion for his contacts with al-Qa'ida operative Majid Khan. FBI and CIA shared intelligence from interviews of KSM, Khan, and Faris on a near real-time basis and quickly ascertained that Faris had met and accepted operational taskings from KSM on several occasions. Faris is currently serving a 20-year sentence for conspiracy and material support to a terrorist organization. ~~(TS//~~[redacted]~~//NF~~[redacted]~~)~~

Bringing new targets to light. A variety of detainee reporting has provided our initial information about individuals having links to al-Qa'ida and has given us insight into individuals about whom we had reporting but whose al-Qa'ida involvement was unclear. For example, **detainees in mid-2003 helped us build a list of** [redacted] **individuals—many of whom we had never heard of before—that al-Qa'ida deemed suitable for Western operations. We have shared this list broadly within the US intelligence and law enforcement communities,** [redacted]

- **Jafar al-Tayyar first came to FBI's attention when Abu Zubaydah named him as one of the most likely individuals to be used by al-Qa'ida for operations in the United States or Europe.** Jafar was further described by detainees, whose description of Jafar's family in the United States was key to uncovering Jafar's true name. An FBI investigation identified Gulshair El Shukrijumah, leader of a mosque in Hollywood, Florida, as having a son named Adnan who matched the biographical and physical descriptions given by the detainees. A "Be On The Lookout" notice has been issued for Adnan El Shukrijumah.

- **Most recently, for example, Abu Faraj al-Libi has revealed that an operative we were only vaguely aware of was actually sent to [redacted] in 2004 to lay the groundwork for al-Qa'ida attacks there:** [redacted] ~~(S//~~[redacted]~~NF)~~

Revealing Plots, Potential Targets ~~(S//NF)~~

One of the fall-outs of detaining these additional terrorists has been the unearthing and at least temporary thwarting of a number of al-Qa'ida operations in the United States and overseas.

Possible Nuclear Threat to the United States. In some of the most groundbreaking information on al-Qa'ida collected in 2004, detainee Sharif al-Masri provided at least 11 intelligence reports on nuclear and biological issues related to al-Qa'ida and may have revealed a new nuclear threat to the US Homeland associated with al-Qa'ida's key explosives expert Abu 'Abd al-Rahman al-Muhajir.

- Sharif's debriefings indicated that he was aware of recent and possibly ongoing efforts to move an unspecified nuclear "bomb" into the United States, possibly via Mexico, through his discussion in February 2004 with Muhajir. This reporting confirmed and fleshed out [redacted] reporting from 2004 about a plan to move people into the US through Mexico. The nuclear aspects to the threat, however, were new and confirmed al-Qa'ida's continuing interest in WMD. ~~(TS/~~[redacted]~~NF)~~

Heathrow Airport plot. Shortly after his capture in March 2003, KSM divulged limited information about his plot to use commercial airliners to attack Heathrow Airport and other targets in the United Kingdom; he discussed this plot probably because he believed that key Heathrow plotter Ramzi bin al-Shibh, who had been detained six months previously, had already revealed the information.

- Debriefers used KSM's and Bin al-Shibh's reporting to confront Khallad and Ammar al-Baluchi, who were caught two months after KSM. Khallad admitted to having been involved in the plot and revealed that he directed group leader Hazim al-Sha'ir to begin locating pilots who could hijack planes and crash them into the airport. Khallad said he and operative Abu Talha al-Pakistani considered [redacted] countries as possible launch sites for the hijacking attempts and that they narrowed the options to [redacted]

- Khallad's statements provided leverage in debriefings of KSM. KSM fleshed out the status of the operation, including identifying an additional target in the United Kingdom, Canary Wharf. ~~(S//NF)~~

Revealing the Karachi plots. When confronted with information provided by al-Qa'ida senior facilitator Ammar al-Baluchi, Khallad admitted during debriefings that al-Qa'ida was planning to attack the US Consulate in Karachi, Westerners at the Karachi Airport, and Western housing areas. ~~(S//NF)~~

Aiding Our Understanding Of Al-Qa'ida ~~(S//NF)~~

The capture and debriefing of detainees has transformed our understanding of al-Qa'ida and affiliated terrorist groups, providing increased avenues for sophisticated analysis. Prior to the capture of Abu Zubaydah in March 2002, we had large gaps in knowledge of al-Qa'ida's organizational structure, key members and associates, intentions and capabilities, possible targets for the next attack, and its presence around the globe.

- **Within months of his arrest, Abu Zubaydah provided details about al-Qa'ida's organizational structure, key operatives, and modus operandi. It also was Abu Zubaydah, early in his detention, who identified KSM as the mastermind of 9/11.** ~~(S/~~[redacted]~~/NF)~~

In the years since 9/11, successive detainees have helped us gauge our progress in the fight against al-Qa'ida by providing updated information on the changing structure and health of the organization.

Hassan Ghul. After his early 2004 capture, Hassan Ghul provided considerable intelligence on al-Qa'ida's senior operatives in Waziristan and elsewhere in the tribal regions of Pakistan. **We had fragmentary information** [redacted] **identifying the Shkai valley as a safehaven for al-Qa'ida and associated mujahidin before Ghul's capture; however, Ghul's reporting brought instant credibility to all this disparate reporting and added minute details to what had previously been a murky, nascent picture.** Ghul helped us assess that this valley, as of December 2003, was not just one haven for al-Qa'ida in Waziristan, but the home base for al-Qa'ida in the area and one that al-Qa'ida was reluctant to abandon.

- [redacted] **Ghul—a key al-Qa'ida facilitator—pointed out the location in the Shkai valley, Waziristan, Pakistan of safehouses of specific al-Qa'ida senior leaders.** [redacted] Although we had a body of reporting from clandestine and other sources indicating that senior al-Qa'ida targets were congregating in the Shkai valley in 2004, Ghul's confirmation and critical **narrative helped counterterrorism officers** [redacted]

- **Ghul also provided our first knowledge of Pakistani operatives trained** [redacted] Ghul then supplied detailed insight into the nature of their training, the al-Qa'ida operatives involved in their grooming, and the location of [redacted] facilities in Shkai where the operatives trained. [redacted] learned later through debriefings of Abu Talha al-Pakistani—who helped recruit the Pakistanis—that **one of the operatives,** [redacted] **was attempting to apply for a US student visa** [redacted] ~~(S~~[redacted]~~NF)~~

Sharif al-Masri. Sharif al-Masri also provided invaluable insights in over 150 disseminated reports that have aided our analysis of al-Qa'ida's current organization, the personalities of its key members, and al-Qa'ida's decisionmaking process. ~~(TS//~~[redacted]~~NF)~~

Various operatives discuss capabilities, including CBRN. Detained al-Qa'ida technical experts—some of whom had very focused roles in the organization—have provided unique insight into the origins of the group's efforts to develop weapons and the technical limitations of key al-Qa'ida personnel—in particular, detainees have helped to clarify al-Qa'ida's CBRN program.

- Abu Zubaydah and senior al-Qa'ida military trainer Ibn al-Shaykh identified [redacted]—who had been associated with poison training—as the individual who conducted experiments with mustard on rabbits and dogs.

- KSM's reporting advanced our understanding of al-Qa'ida's interest in developing a nuclear weapons program, and also revealed important information about al-Qa'ida's program to produce anthrax. He apparently calculated incorrectly that we had this information already, given that one of the three—Yazid Sufaat—had been in foreign custody [redacted]

- After being confronted with KSM's reporting, Yazid eventually admitted his principal role in the anthrax program and provided fragmentary information on [redacted] ~~(S/~~[redacted]~~NF)~~

Illuminating Other Collection ~~(S//NF)~~

Detainee reporting has allowed us to confirm reporting from clandestine and other sources, and makes sense of fragmentary information, [redacted]

- As noted earlier, Abu Faraj—along with other detainees—has begun to flesh out threat reporting received [redacted] during 2004, including tasking to send operatives to the US via Mexico and hopes to mount an attack prior to the 2004 US Presidential elections. While we are still in the early stages of exploiting the full extent of Abu Faraj's knowledge on Homeland threats, information he and others have provided has confirmed that efforts were underway to mount an attack in the US Homeland beginning in late 2003. [redacted]

[redacted]

- Hassan Ghul's disc containing a message from Zarqawi for Bin Ladin about Zarqawi's plan in Iraq coupled with Ghul's own reporting brought the burgeoning relationship between Zarqawi and al-Qa'ida into clear focus for the first time since the US entry into Iraq. ~~(S/~~[redacted]~~NF)~~

[redacted]

Detainees have been particularly useful in sorting out the large volumes of documents and computer data seized in raids. Such information potentially can be used in legal proceedings, as physical evidence, [redacted] It also can be used in confronting detainees to get them to talk about topics they would otherwise not reveal.

- For example, lists of names found on Mustafa al-Hawsawi's computer seized in March 2003 represented al-Qa'ida members who were to receive money. Debriefers questioned detainees extensively on these names to determine who they were and how important they were to the organization. This information helped us to better understand al-Qa'ida's revenues and expenditures, particularly in Pakistan, and money that was available to families.

- The same computer had a list of e-mail addresses for individuals KSM helped deploy abroad that he hoped would execute operations; most of these names were unknown to us, and we used this information in debriefings of KSM and other detainees to unravel KSM's plots. ~~(S/~~[redacted]~~NF)~~

Helping To Validate Other Sources ~~(S//NF)~~

Detainee information is a key tool for validating clandestine sources who may have reported false information. In one case, the detainee's information proved to be the accurate story, and the clandestine source was confronted and subsequently admitted to embellishing or fabricating some or all the details in his report.

- Pakistan-based facilitator Janat Gul's most significant reporting helped us validate a CIA asset who was providing information about the 2004 pre-election threat. The asset claimed that Gul had arranged a meeting between himself and al-Qa'ida's chief of finance, Shaykh Sa'id, a claim that Gul vehemently denied.

- Gul's reporting was later matched with information obtained from Sharif al-Masri and Abu Talha, captured after Gul. With this reporting in hand, CIA [redacted] the asset, who subsequently admitted to fabricating his reporting about the meeting. ~~(S/~~[redacted]~~NF)~~

In other instances, detainee information has been useful in identifying clandestine assets who are providing good reporting. For example, Hassan Ghul's reporting on Shkai helped us validate several assets [redacted] who also told us that al-Qa'ida members had found safehaven at this location.

- Sometimes one detainee validates reporting from others. Sharif corroborated information from [redacted] who were involved in facilitating the movement of al-Qa'ida personnel, money, and messages into and out of [redacted] For example, [redacted] indicated that [redacted] was the link between al-Qa'ida and [redacted] and Sharif corroborated that fact when he noted that [redacted] was the "go-between" for al-Qa'ida and [redacted] ~~(S/~~[redacted]~~NF)~~

Challenges of Detainee Reporting (S//NF)

I don't want to leave you with the impression that we do not assess detainee reporting with the same critical eye that we would other sources of intelligence. Detainees' information must be corroborated using multiple sources of intelligence; uncorroborated information from detainees must be regarded with some degree of suspicion. A detainee is more likely to budge if the debriefer, using information from another source, can demonstrate that the detainee possesses knowledge of the particular subject.

- **This tendency to reveal information when cornered with facts is one of the reasons we view unilateral custody as so critical. Not only are we certain of the exact questions being asked and answers being given,** [redacted] ~~(S/~~[redacted]~~NF)~~

(U) APPENDIX III: Email from: [redacted]; to: [redacted] [REDACTED], [redacted] subject: could AQ be testing [the source] and [redacted] date: March [redacted] 2004, at 06:55 AM; Email from: [redacted] to [redacted] cc: [redacted] [REDACTED], [redacted] subject: Re: could AQ be testing [the source] and [redacted]; date: March [redacted] 2004, at 7:52:32 AM

From: [redacted]
To: [redacted]
Cc: [redacted]
Bcc:
Subject: Re: could AQ be testing [redacted]
Date: 3/[redacted]/2004 7:52:32 AM

Yes, that occured to me too. I agree w/ your concerns re [redacted] as well. It's always possible that they are just hearing the same "rumint" as well. however, when [redacted] So I just don't know. But again, I've been a bit concerned about [redacted] too . . .

Original Text of [redacted]
[redacted] -- CTC/UBL -- [redacted]

03/[redacted]/04 06:55 AM

To: [redacted]
cc:
Subject: could AQ be testing [redacted]

i was struck by this weekend's [redacted] reporting re an attack on conus to influence the elections in nov. 04. both reported vague "plans", [redacted] worthless in terms of actionable intelligence, [redacted] in contrast, the 17 march 04 AQ statement below makes it explicitly clear that AQ has no/no intention of attacking conus before the election; they want president bush to stay right where he is. Now, AQ knows all threat reporting causes panic in washington and that it leaks soon after it is received -- as will the reports from [redacted] this weekend -- and this would be an easy way to test [redacted]

this is not to say [redacted] wrong, or that the AQ statement below is anything more than disinformation. the coincidence of [redacted] reports and the AQ statement, however, caught my eye. [redacted]

A word to the idiot Bush[0]

We know you live the worst days of your life in fear of the brigades of death that ruined
your life. We tell you we are all keen that you do not lose the forthcoming elections.
We are aware that any large-scale operation will destroy your government but we do not
want this to happen. We will not find a person dumber[0] than you. You adopt force
rather than wisdom and shrewdness. Yes, your stupidity and religious fanaticism is what
we want because our nation will not wake up from its sleep unless an enemy emerges
that lies in wait for the nation. Actually, there is no difference between

you and [Democratic presidential candidate John] Kerry. Kerry will take our nation unawares and kill it. Kerry and the Democrats possess enough deception to give a face-lift to atheism and convince the Arab and Islamic nation to support it in the name of modernization.

Therefore, we are very keen that you, criminal Bush[0], will win the upcoming elections.

(U) APPENDIX IV: CIA, Office of General Counsel draft *Legal Appendix: Paragraph 5-- Hostile Interrogations: Legal Considerations for CIA Officers*, November 26, 2002

HOSTILE INTERROGATIONS: LEGAL CONSIDERATIONS FOR CIA OFFICERS

I. U.S. federal law makes it a crime for a U.S. citizen to torture someone both at home and abroad, even when directed to do so by superiors.

   A. 18 U.S.C. §§ 2340 - 2340B implements the United Nations Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, and incorporates verbatim the definition of "torture" from that treaty; namely, the Convention defines torture as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering," where "severe mental suffering" is further defined as "the prolonged mental harm resulting from" either causing or threatening infliction of severe physical pain; the administration or threat of administration of mind-altering drugs; the threat of imminent death; or threatening to do the above to someone else.

   B. Use of necessity as a defense to prosecution in a U.S. court

      1. Israel's Supreme Court has recognized that government officials who are prosecuted for torture may use the affirmative defense of necessity—i.e., "for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things (circumstances), at the requisite timing, and absent alternative means for avoiding the harm."[3] That is, a government officer can avoid criminal prosecution if the torture was necessary to prevent a danger "certain to materialize" and when no other means of preventing the harm are available.

      2. The ruling, however, specifically notes that although necessity can be used as a *post factum* defense, it cannot serve as a source of positive, *ab initio* authority for the systemic (even if rare) use of torture as a valid interrogation tool.

      3. The U.S. Code does not contain a statutory necessity defense provision, but U.S. common law has recognized an analogous doctrine:

         - State v. Marley, 509 P.2d 1095, 1097(1973): Defendants were charged with criminal trespass on the property of Honeywell Corporation in Honolulu. They argued that they were seeking to stop the Vietnam War and raised as one of their defenses the "necessity defense." The court stated:

           > The "necessity defense" exonerates persons who commit a crime under the pressure of circumstances if the harm that would have

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[3] H.C. 5100/94, 4054/95, 6536/95, 5188/96, 7563/97, 7628/97, 1043/99.

> resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law. Successful use of the "necessity defense" requires (a) that there is no third and legal alternative available, (b) that the harm to be prevented be imminent, and (c) that a direct, causal relationship be reasonable anticipated to exist between defendant's action and the avoidance of harm.

Although the Marley court decided the necessity defense was not available to these particular defendants, the standard they set out is the norm.

- In United States v. Seward, 687 F.2d 1270, 1275 (10th Cir. 1982) (en banc), *cert. denied*, 459 U.S. 1147 (1983), the court held that a defendant may successfully use a defense of necessity to excuse otherwise illegal acts if (1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonable anticipated to exist between defendant's action and the avoidance of harm. Under the defense of necessity, "one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense[] will fail," *Id.* at 1276, quoting United States v. Bailey, 444 U.S. 394 (1980). In proving that there were no legal alternatives available to assist him, a defendant must show he was "confronted with ... a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts." *Id.*

- See also United States v. Contento-Pachon, 723 F.2d 691, 695 n.2 (9th Cir. 1984) (defense of necessity available when person faced with a choice of two evils and must decide whether to commit a crime or an alternative act that constitutes a greater evil); United States v. Nolan, 700 F.2d 479, 484 (9th Cir.) (the necessity defense requires a showing that the defendant acted to prevent an imminent harm which no available options could similarly prevent).

- **In sum:** U.S. courts have not yet considered the necessity defense in the context of torture/murder/assault cases, primarily because in cases where one or two individuals were hurt out of necessity, this was treated as a *self-defense* analysis. *See* Tab 2, *supra*. It would, therefore, be a novel application of the necessity defense to avoid prosecution of U.S. officials who tortured to obtain information that saved many lives; however, if we follow the Israeli example, CIA could argue that the torture was *necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm.*

ADDITIONAL MINORITY VIEWS OF SENATOR COBURN, VICE CHAIRMAN CHAMBLISS, SENATORS BURR, RISCH, COATS, AND RUBIO

Additional Views by Senator Tom Coburn, MD, Vice Chairman Saxby Chambliss, Senators Burr, Risch, Coats and Rubio

(U) As parts of the Senate Select Committee on Intelligence (SSCI) "Committee Study of the Interrogation and Detention Program" (hereafter, the "Study") become declassified, it is our hope that, in addition to these and the other Minority views, the Central Intelligence Agency (CIA) response of June, 2013 also be declassified. Interested and objective readers will be able to balance these various views as they make their own assessments of the flaws, errors, initiatives and value of the CIA's detention and interrogation program conducted and terminated in the previous decade.

~~(S//NF)~~ For those who hold already set views, they may or may not be surprised that the CIA agreed with a number of the Study's findings, at least in part, although the CIA disagreed, in substance, with the core assertions of the Study: that the interrogation program provided little valuable intelligence and that the CIA misrepresented the program to the White House, other executive agencies, the Congress and the public (through the media).

(U) As stated in the Minority views and the CIA response, so only briefly reiterated here, the methodology for the Study was inherently flawed. A SSCI investigation of this depth and importance requires that, in addition to a document review, interviews with participants and managers be conducted. This standard approach was included in the terms of reference that established the Study in March, 2009. For a recent and relevant example, the SSCI's investigation into the intelligence failures regarding weapons of mass destruction in Iraq, "U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq," (July, 2004), was based on Committee interviews with more than 200 intelligence community (IC) officers, including analysts and senior officials, in addition to a review of tens of thousands of documents. Some of those individuals were interviewed up to 4 times, as Committee staff worked to reconcile the complex documentary record with the perspectives of those involved in the analytic production. (That report, when published, was supported unanimously by the Committee, 15-0. This is significant in that properly performed reviews tend to gain bipartisan approval.)

(COMMITTEE SENSITIVE) In addition, no Committee hearings were conducted with members of the IC once the Study was initiated in 2009 until it was first voted out of Committee in 2012. In sum, a massive (but still incomplete) outlay of documents was reviewed in isolation (outside of Committee spaces), without the benefit of interpretation or perspective provided by the actual participants in the program.

(COMMITTEE SENSITIVE) Perhaps if such interviews had occurred, the authors of the Study would have had better exposure to the analytic processes that underpin a global collection program that sought, in response to the attacks of 9/11, to assemble an analytic picture of a poorly understood global terrorism network, al-Qa'ida. Thousands of analysts worked with the reports that were derived from the interrogations (most of which were conducted without the use of enhanced interrogation procedures) and thousands of analytic products were generated to build an understanding of the terror organization that attacked us on September 11, 2001. To read the Committee Study, the reader could conclude that majority of those analysts did not properly understand their profession and their products were flawed. That conclusion would be false.

(U) A fundamental fact is missing from the point of departure for the Study: For any nation to respond to an attack by an insurgency, terrorist organization or armed group, the primary source of human intelligence will be detainee reporting. The CIA's program, improvised in its early stages because the CIA had no established protocols to draw on, sought to build the capacity to gather this intelligence by creating a global information network where the intelligence gained from interrogations around the world could be assessed, corroborated and challenged by analysts working in real-time to better develop an intelligence picture of a very real threat whose dimensions and direction were unknown to us.

(U) How detainee reporting is collected – through what protocols of interrogation -- is the challenge that every nation, and, in particular, nations bound by the rule of law, must answer. This fundamental question is not addressed in the Study.

(U) Instead, the most adamant supporters of the Study have declared that the effect of this Study will be that the abuses they assess occurred will never happen again. This is an odd conclusion, in that the CIA's interrogation program was ended in the last decade, and President Obama's Executive Orders put in place measures and procedures that clearly indicate the program would not be reconstituted. If the point of the Study was to end something the supporters of the Study wanted to terminate, the objective was achieved before the Study began.

(U) But if the point of the Study is to ensure that abuses assessed by the supporters of the Study never occur again, the Study made no contribution to ensuring this because it failed to offer recommendations for lawful interrogation protocols for the collection of detainee intelligence in the future. Even more striking than the fact that the Study was completed without conducting interviews is the complete absence of any recommendations, recommendations that could provide meaningful guideposts for the future.

(U) There is a cycle that can be observed in democracies fighting armed groups and relying upon detainee intelligence gained from interrogation. It is a cycle that has occurred in democracies throughout the last century and, in fact, throughout American history.[1] An episode of national security crisis is responded to with urgency and frenzy, and the detention cycle begins. The early stage of the cycle is usually when the instances of brutality may occur. Over time, interrogation protocols are reconciled with the rule of law (and practicality, as brutality does not guarantee good intelligence). A consideration of American, British and Israeli history – to cite three examples of democratic societies – provides examples of this cycle in each country.

~~(S//NF)~~ That this cycle can repeat reflects an apparent weakness in democracies, including our own, in their inability to process and retain "lessons learned." We have certainly seen this elsewhere in the national security sphere – how our various national security institutions have "forgotten," for example, counterinsurgency theory, public diplomacy, and covert influence practices.

(U) This Study has many flaws, articulated in the other Minority views and the CIA response. To that we would add is the failure to extract "lessons learned," in the form of recommendations that provide insights into which interrogation techniques work in gathering foreign intelligence and are consistent with rule-of-law principles. This knowledge, were it to be captured and held in doctrine, would provide the tools for this nation as it continues to face threats from terrorist organization or other armed group overseas. Only in this way could the intent of "never again" be in fact ensured.

(U) The Study provided no such recommendations for the future. Instead it is a partisan prosecutor's brief against history. It is a 6,000 page exercise in the rhetorical trope of synecdoche, where a part – in this case, the most egregious abuses, such as waterboarding – is substituted for the whole – in this case, the entire CIA detention and interrogation program, most of which did not rely on enhanced interrogation techniques and most of which provided the intelligence picture of al-Qai'da in the first decade of the 21st century. We caution any reader of the Study against ever concluding that the threats of today and tomorrow can be addressed without the value of detainee intelligence that provided this picture of al-Qa'ida that allows us to prevail against it in the second decade of the 21st century.

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[1] . Dr. Coburn is grateful to have had access to *United States Detention Policy in Counterterrorism and Counterinsurgency Operations: 2001 to 2011*,particularly chapter 1, "Detention in US History from 1775 to 2000," Dr. Ahmed Qureshi, unpublished thesis submitted for the Degree of Philosophy (PhD), Kings College, University of London, 2013.

SENATORS RISCH, COATS, & RUBIO ADDITIONAL VIEWS

ADDITIONAL MINORITY VIEWS OF SENATORS RISCH, COATS, AND RUBIO

(U) As the only two members of both the Senate Foreign Relations Committee and the Senate Select Committee on Intelligence (SSCI), and as a former U.S. Ambassador to Germany, we maintain a unique perspective on declassification of the Study as it pertains to U.S. foreign policy and the security of U.S. embassies and consulates overseas. That perspective was further informed by the Department of State's intelligence chief, who warned the SSCI in 2013 that declassification could endanger U.S. personnel and jeopardize U.S. relations with other countries. This warning was particularly significant following the Benghazi terrorist attacks, which serve as a fresh reminder of the enormous risk facing U.S. embassies and consulates overseas. As a result, we voted against declassification of the Study.

U.S. Foreign Policy Considerations

~~(TS/~~[redacted]~~/NF)~~ On June 10, 2013, the SSCI received a classified letter from Assistant Secretary of State Philip Goldberg regarding the potential declassification of the Study. The letter raised two "significant State Department equities" pertaining to foreign policy concerns and the security of diplomatic facilities. With respect to foreign policy concerns, the letter states:

> If the report is declassified or disclosed without appropriate preparation or precautions, it could negatively impact foreign relations with multiple U.S. allies and partners who have participated in or have had nationals involved in the detention and interrogation program. Even with some country names redacted, context and publicly available information make it possible to identify some specific countries and facilities. Many of these countries cooperated with the United States on this program based on the understanding that their involvement would not be publicly disclosed. Publicly acknowledging their roles at this stage would have significant implications for our bilateral relationships and future cooperation on a variety of national security priorities, and could impact our relationships with countries even beyond those involved in the program. Should the report be declassified or released in any form, the Department would request notice well in advance to allow for coordination with our embassies and foreign counterparts.
>
> [redacted]

These concerns were not limited to the U.S. Department of State. Multiple diplomatic envoys posted in Washington raised similar concerns with us individually.

Diplomatic Security

~~(TS/~~[redacted]~~/NF~~) With respect to the security of diplomatic facilities, the letter states: "With heightened threats and ongoing instability in the Middle East, North Africa, and elsewhere, the release of this report has the potential to provoke additional demonstrations against U.S. interests and to increase targeting of U.S. missions and U.S. citizens around the globe." In the days leading up to the SSCI vote to declassify the Study, the Minority also contacted the White House to obtain their views on this issue. The Minority learned that at the time of the vote to declassify the Study, the Executive Branch was already developing security upgrades at various diplomatic facilities to coincide with the expected release of the Study. This fact was confirmed in a letter the SSCI received on April 18, 2014, from White House Counsel Kathryn Ruemmler. This letter stated: "Prior to the release of any information related to the former RDI program, the Administration will also need to take a series of security steps to prepare our personnel and facilities overseas."

Conclusion

(U) While we generally support efforts to provide the American public with as much information as possible, our experiences and the stark warnings provided by the Department of State, the White House, and foreign diplomats serving in Washington made a compelling case to keep this material classified. We hope and pray the declassification process does not jeopardize the safety and security of the men and women who serve our country overseas or U.S. foreign policy. Ultimately, we could not take the risk to vote to declassify the Study, especially given our shared concerns for the utility of the underlying process and report.

Comments on the *Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Former Detention and Interrogation Program*

1. (U/~~FOUO~~) The comments presented in this paper on *The Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Detention and Interrogation Program* (hereinafter referred to as the *Study*), along with the more detailed discussion accompanying this paper, are the product of a review of the *Study* originally commissioned in December, after the Committee adopted the report, by then Acting Director Morell. The purpose of the review was to focus, as the *Study* does, on the Agency's conduct of the RDI program, in the interest of promoting historical accuracy and identifying lessons learned for the future, with the ultimate goal of improving the Agency's execution of other covert action programs. Indeed, as the former detention and interrogation program was ended as of 22 January 2009, and has been completely dismantled, forward focus on ongoing covert action activity is critically important. Accordingly, in this submission, we do not address the policy decision made to utilize coercive interrogation techniques as part of the RDI program, nor do we advocate or otherwise express any judgments concerning the wisdom or propriety of using those techniques.

2. (U/~~FOUO~~) We would like to note at the outset the limits on what we were able to accomplish, even with the additional time we took beyond the Committee's initial 15 February 2013 deadline. Recognizing the impossibility of poring over each of the *Study's* almost 6,000 pages in the time allotted, ADCIA Morell asked a select group of CIA analysts and managers, none of whom had decision-making responsibility for the former rendition, detention, and interrogation (RDI) program, to concentrate on the *Study's* 20 conclusions and to dive deep on a discrete portion of the main text. Specifically, he asked the group to focus on the portion of the *Study* that assesses the value of the information derived from CIA's RDI's activities. That portion of the *Study* is important because it serves as the basis for a number of assertions in the *Study's* conclusions as to the veracity of CIA's representations regarding the program.

3. (U/~~FOUO~~) ADCIA Morell then asked three senior officers to carefully review the group's work, to develop recommendations with regard to remedial measures that flowed from their review of the *Study,* and to provide their main findings and recommendations in this paper.

4. (U/~~FOUO~~) To be clear, although we did mount a serious effort to respond, we were not able to perform a comprehensive fact check or provide the "technical corrections" requested by the Committee. That proved impossible for two reasons. First, it was simply impractical to provide line-by-line comments on a document of such great length in such a short period of time. Second, and just as important, for those portions we were able to review in detail, we found that accuracy was encumbered as much by the

[redacted]

authors' interpretation, selection, and contextualization of the facts as it was by errors in their recitation of the facts, making it difficult to address its flaws with specific technical corrections.

5. (U//~~FOUO~~) The *Study* has all the appearances of an authoritative history of CIA's RDI effort. As Chairman Feinstein announced to the press the day it was approved by the Committee, its authors had access to 6 million pages of records—most provided by CIA—and they cite more than 35,000 footnotes. However, although the *Study* contains an impressive amount of detail, it fails in significant and consequential ways to correctly portray and analyze that detail. Simply put, the *Study* tells part of the story of CIA's experience with RDI, but there are too many flaws for it to stand as the official record of the program. Those flaws stem from two basic limitations on the authors:

- (U//~~FOUO~~) A methodology that relied exclusively on a review of documents with no opportunity to interview participants, owing to the Department of Justice investigation of the program; and

- (U//~~FOUO~~) An apparent lack of familiarity with some of the ways the Agency analyzes and uses intelligence.

6. (U//~~FOUO~~) Accompanying this paper are responses to each of the 20 examples in the *Study* of the value of the intelligence acquired during CIA interrogations of detainees and the Agency's representations of that intelligence. In addition, we provide responses to each of the *Study's* 20 conclusions. In each response we have identified those points in the relevant conclusion or supporting text with which we agree, and those we think are in error. These responses offer the fullest sense of our views on the *Study's* accuracy.

Key Themes

7. (U//~~FOUO~~) For the purposes of this paper, the *Study's* findings have been consolidated into four key themes that emerged from our reading of the *Study's* conclusions. Those themes are:

a) (U) CIA was unprepared to conduct an RDI effort and inadequately developed and monitored its initial activities.

b) (U) The program was poorly managed and executed. Unqualified officers and contractors imposed brutal conditions, often used unapproved interrogation techniques, used approved techniques excessively, and were rarely held accountable.

c) (U) Contrary to CIA representations, the program failed to produce intelligence that was otherwise unavailable and that enabled CIA to disrupt plots, capture terrorists, or save lives.

d) *(U) CIA resisted internal and external oversight, and it misrepresented the program to Congress, the Executive Branch, and the media.*

A. (U) CIA was unprepared to conduct an RDI effort and inadequately developed and monitored its initial activities.

8. (U/~~/FOUO)~~ We fully agree that CIA was unprepared to initiate an RDI effort. CIA did not have a cadre of trained interrogators, particularly with adequate foreign language skills. CIA had little experience handling, moving, and interrogating detainees and no core competency in detention facility management. Moreover, the Agency faced this challenge at a time when it was overwhelmed by the other aspects of its worldwide response to the threat of more mass casualty attacks.

- ~~(S//OC/NF)~~ At the same time that CIA encountered the need to hold and interrogate terrorists, it also was focused on redirecting substantial resources to the Counterterrorism Center (CTC), undertaking high-risk operations in [redacted] trying to find Usama Bin Ladin, and enlisting the aid of liaison partners across the globe in the fight against al-Qa'ida.

9. (U/~~/FOUO)~~ We also agree with the *Study* that "CIA did not adequately develop and monitor its initial detention and interrogation activities." In agreeing with this statement, however, we draw particular attention to the word "initial." One of the main flaws of the *Study* is that, especially in its Summary and Conclusions, it tars CIA's entire RDI effort with the mistakes of the first few months, before that effort was consolidated and regulated under a single program management office.

10. (U/~~/FOUO)~~ While we take issue with the way the *Study* conflates distinct chapters in the history of the program, we acknowledge that there were serious shortcomings in the first such chapter. Perhaps the single biggest mistake in carrying out the RDI effort was CIA's failure to immediately respond to the extraordinary and high-risk requirements of conducting RDI activities by establishing a dedicated, centrally managed office tasked with quickly promulgating operational guidelines for RDI activities. Such an office should have been properly resourced and empowered to take control of those activities worldwide and monitor them on a day-to-day basis. This happened, but not fast enough.

- ~~(TS/~~[redacted]~~NF)~~ As a result, although the confinement conditions and treatment of high profile detainees like Abu Zubaydah were closely scrutinized at all levels of management from the outset, the same cannot be said for the first few of months of CIA's handling of lower-profile detainees in [redacted]

11. ~~(S//OC/NF)~~ It was during those months that grim conditions and inadequate monitoring of detainees were allowed to exist at [redacted] culminating in the death of Gul Rahman in November 2002, two months after the first detainee arrived there. During

this time there were several instances of unauthorized, improvised techniques, including mock executions and "hard takedowns" at [redacted]

12. ~~(TS/~~[redacted]~~NF)~~ Contrary to the *Study*'s assertion that the confinement conditions during the early days of [redacted] were not "previously known," they were exhaustively reviewed by the Office of the Inspector General (OIG) and described in detail in its 2004 *Special Review*, as well as in its separate April 2005 *Report of Investigation: Death of a Detainee* [redacted] These reports were shared with the Chairman and Vice Chairman of the oversight committees.

13. ~~(S//OC/NF)~~ We believe this period represents a failure at all levels of management. CIA simply did not devote the kind of attention to managing the risk of this new challenge that it should have at the outset. However, in contrast to the impression left by the *Study*, the confusion over responsibility, lack of guidance, and excessively harsh conditions that detainees experienced in the early days of [redacted] did not characterize more than a few months of our RDI effort. Unfortunately, it took Rahman's death in CIA custody to focus management's attention.

- ~~(S//OC/NF)~~ In response to the problems on which Rahman's death shone a light, CIA centralized the management of and accountability for all detention facilities in a single program office, which endeavored to address the shortcomings at [redacted] as well as isolated problems elsewhere.

- ~~(S//OC/NF)~~ That office also developed standards and guidelines for operating all CIA-controlled detention and interrogation facilities and monitored adherence to those guidelines. The *Study* makes much of the fact that CIA did not issue such guidance until January 2003. It fails to note that this was only four months after [redacted] accepted its first detainee.

14. ~~(TS/~~[redacted]~~NF)~~ We are not suggesting CIA solved all its problems in early 2003. Resource constraints dogged the RDI program throughout its existence, especially in [redacted] and especially after the invasion of Iraq increased the competition for language-capable personnel. Although conditions at [redacted] improved after early 2003, CIA never did—as we believe it should have—put the facility under [redacted] the dedicated full-time management of a more senior CIA officer, as was standard practice at other Agency detention sites. CIA also was unable to fully bring the facility up to the standard of our other detention facilities by the time it was closed in [redacted]

- ~~(TS/~~[redacted]~~NF)~~ There were substantial practical and cover constraints on the Agency's ability to accomplish this in [redacted] that it eventually overcame by replacing [redacted] with a much better facility. We believe, however, CIA could have done more in the interim between Rahman's death and the closure of [redacted]

15. ~~(S//OC/NF)~~ Looking ahead, the lesson we draw from the Agency's initial handling of the RDI effort is that senior leadership must ensure that appropriate structures, lines of authority, and resources are available for major new initiatives, especially risky ones, from the outset. Responsible risk management must be a core competency for Agency leaders. In recent years, CIA has instituted carefully structured and detailed annual reviews [redacted] Our experience with RDI indicates that there may well be programs [redacted] that carry with them sufficient risk to merit similar reviews.

B. (U) The program was poorly managed and executed. Unqualified officers and contractors imposed brutal conditions, often used unapproved interrogation techniques, used approved techniques excessively, and were rarely held accountable.

16. (U/~~/FOUO)~~ Reviews by the OIG clearly show that, in contrast to the impression left by the conclusions of the *Study*, once responsibility for the program was consolidated, the oversight and management of CIA's RDI activities improved substantially. This was not a panacea—other mistakes were made, investigated, and corrected along the way—but the program was much better developed and managed after the initial months.

17. (U) Let us address briefly the most important management and execution issues raised in the *Study*, highlighting those of greatest concern:

18. ~~(TS/~~[redacted]~~NF)~~ **Legal Interpretation.** CIA clearly fell short when it detained some people under a flawed legal rationale, as discussed in the *Study*. Looking back on it now with the benefit of a dozen years of institutional experience interpreting and conducting operations under authorities granted in the 2001 Memorandum of Notification (MoN), it is hard to imagine how Agency lawyers could have developed and applied differing interpretations of the MoN's capture and detain authorities.

- ~~(TS/~~[redacted]~~NF)~~ Although it is a good thing that this seems inconceivable under the legal structures and lines of authority currently in place, we are concerned that it took the accountability exercise mounted after the improper detention of Khalid al-Masri to shed light on and correct this situation.

- ~~(TS/~~[redacted]~~NF)~~ A review that resulted from the accountability board considering the improper detention of al-Masri showed that others detained under the incorrect MoN standard would have met the correct standard, had it been applied correctly. Nevertheless, these incidents remain a blemish on CIA's record of interpreting and working within its counterterrorism authorities.

19. ~~(TS/~~[redacted]~~NF)~~ **Devising an Exit Strategy.** One aspect of the program that Agency managers recognized and struggled with was the inability to formulate

a plan, commensurate with protecting the secrecy of the program, for moving detainees out of Agency-run detention sites. One reason some detainees were held longer than they should have been, especially at [redacted] was that once they were exposed to the facility and the existence of a detention and interrogation program [redacted] the Agency's options for them became constrained by the need to maintain the secrecy of the facility and the program. Managers sought and eventually found solutions to this quandary, but along the way it caused problems. We view the potential challenge of being boxed in by similar cover concerns as something the Agency should consider as it plans future covert actions. However, we also believe the *Study* understates the extent to which CIA repeatedly sought endgame guidance from policymakers.

- ~~(S//OC/NF)~~ Throughout this period, CIA repeatedly sought guidance on the disposition of detainees. The White House and Attorney General had determined that CIA detainees would not be handed over to the US criminal justice system; the Department of Defense refused to accept custody of CIA detainees; and liaison partners were nervous about hosting detention facilities indefinitely.

20. ~~(S//OC/NF)~~ **Interrogation Techniques**. The *Study* is correct that some officers used unauthorized techniques. In contrast to the impression created by the *Study's* conclusions, however, after the initial period at [redacted] and the promulgation of DCI Guidelines, significant improvisation in interrogations occurred only in isolated cases that were reported to and investigated by the OIG and, in some cases, the Department of Justice. Moreover, the *Study* exaggerates how often unauthorized techniques were used because some of the techniques counted as such by the authors—such as cold water dousing and sleep deprivation—were categorized as standard techniques at the time and did not require Headquarters permission for each use.

21. ~~(S//OC/NF)~~ With regard to the waterboard, which was used on three detainees, we acknowledge, as was pointed out in the IG's 2004 *Special Review* and reiterated in the *Study*, that this technique was used with a frequency that exceeded CIA's representations to the Department of Justice's Office of Legal Counsel (OLC), and that this intensity raised serious concerns on the part of the Agency's own medical staff about the lack of available data upon which to draw conclusions about its safety.

- ~~(S//OC/NF)~~ The Attorney General later reaffirmed the legality of the technique despite the intensity of use, but the medical concerns, combined with CIA's increasing knowledge base, its improving skill using less coercive techniques, and the move of al-Qa'ida's senior leaders beyond its reach, ended the use of this technique.

- (U//~~FOUO)~~ As a result, the waterboard was last used in March 2003—just over a decade ago.

22. (U//~~FOUO)~~ In considering the manner in which enhanced techniques were used more broadly, we would fault the *Study* for discounting the discretion that officers

applied when the detainees were cooperative or were judged not to have valuable information. The *Study* portrays an Agency zealously seeking to apply enhanced techniques, a judgment that inaccurately characterizes CIA's own internal deliberations about the conduct of interrogations.

- ~~(S//OC/NF)~~ Contrary to the representation outlined in the *Study's* second conclusion, the Agency did not advocate "a novel application of the necessity defense" to justify interrogations. Rather, the draft internal memorandum the *Study* cites warned that invoking the "necessity defense" would be "novel," meaning tenuous or untested, because US courts had previously neither considered nor accepted such an argument.

- (U/~~/FOUO)~~ CIA leadership twice suspended the use of enhanced techniques pending reaffirmation of legal clearance and policy approval from OLC and the White House.

- ~~(S//OC/NF)~~ In some cases where the *Study* criticizes CIA for immediately applying enhanced techniques too quickly, [redacted]

- ~~(S//OC/NF)~~ In some instances the only technique used was sleep deprivation, and there were multiple occasions—ignored by the *Study*—in which the Agency applied no enhanced techniques because officers judged detainees were cooperating as a result of standard interrogation and debriefing techniques, or opted to forego specific techniques because officers judged they would most likely only stiffen the resolve of the detainee.

- ~~(S//OC/NF)~~ The *Study's* conclusions also fail to note the general trend that, beginning in April 2003, as interrogators became more knowledgeable, as it became easier to use information from one detainee to get more from another, and as our understanding of the effectiveness of various techniques grew, CIA's interrogations gradually relied less on coercion.

23. ~~(TS/~~[redacted]~~NF)~~ **Study of Effectiveness.** Although CIA gradually became more knowledgeable about and selective in its use of enhanced interrogations techniques, we agree fully with the *Study's* critique of the Agency's failure to perform a comprehensive analysis of the effectiveness of those techniques. As we discuss in the next section, CIA did, for the most part, accurately assess the value of what it derived in its interrogations; but that does not equate to a robust assessment of the efficacy of how it derived that information relative to other possible approaches. The internal and external studies commissioned in response to an OIG recommendation offered some useful insights, but they fell well short of the kind of systematic, comprehensive, independent assessment of program effectiveness that the Agency should be looking for while assessing its covert actions in the future.

24. ~~(S//OC/NF)~~ **Personnel.** There is no doubt that the shortage of personnel able and willing to participate in the program was a huge challenge. Language-capable officers were in particularly short supply, even more so after the US invasion of Iraq. We agree with the *Study* that some officers with [redacted] issues were among the over [redacted] officers (managers, interrogators, debriefers, linguists, security officers, support and medical personnel), not including contractors, who carried out the program. In some cases, these individuals possessed unique, hard-to-find skills, such as regional languages or debriefing/paramilitary skills. We do not agree, however, with the *Study's* implication that Agency managers made a routine practice of knowingly sending [redacted] individuals to the field.

- [redacted]
- [redacted]

25. (U/~~/FOUO)~~ **Accountability.** We gave very careful consideration to the *Study's* assertion that CIA officers who violated policy were only rarely held accountable. Our review of this Conclusion did indeed indicate significant shortcomings in CIA's handling of accountability for problems in the conduct and management of CIA's RDI activities. As we note in our response to Conclusion 16, however, the *Study* lays out two supporting arguments that are best assessed separately, because we agree with—and have expanded on—the first, but the second appears unfounded.

- ~~(S//OC/NF)~~ The first argument is that in some important cases involving clearly evident misconduct, CIA did not in the end sufficiently hold officers accountable even after full investigation and adjudication. We largely concur, although we would take the *Study's* argument one step further. The *Study* focuses on the inadequate consequences meted out for line officers who acted improperly when conducting interrogations in the field or by providing insufficient rationales necessary to justify detentions. To us, an even more compelling concern is that the Agency did not sufficiently broaden and elevate the focus of its accountability efforts to include more senior officers who were responsible for organizing, guiding, staffing, and supervising RDI activities, especially in the beginning.

- ~~(S//OC/NF)~~ The Conclusion's second supporting argument is that there were many more instances of improper actions for which some form of accountability exercise should have been conducted but was not. We found problems with the factual basis for this argument, which we lay out in our response to Conclusion 16.

26. ~~(S//OC/NF)~~ With regard to the first argument, although considerable attention was paid to cases of wrongdoing, we acknowledge that, particularly in the cases cited in the *Study*, the narrow scope of the Agency's accountability efforts yielded outcomes that are, in retrospect, unsatisfying in view of the serious nature of the events. Most notably, we believe that CIA leaders erred in not holding anyone formally accountable for the actions and failure of management related to the death of Gul Rahman at [redacted] in 2002.

27. ~~(S//OC/NF)~~ In that case, we can appreciate the reasoning underlying CIA management's decision to overturn an accountability board recommendation that would have imposed sanctions on the least experienced officer involved. The most junior in the chain of command should not have to bear the full weight of accountability when larger, systemic problems exist and when they are thrust into difficult warzone situations by their supervisors and given a risky and difficult task with little preparation or guidance. Still, it is hard to accept that a CIA officer does not bear at least some responsibility for his or her actions, even under trying circumstances.

- ~~(S//OC/NF)~~ Moreover, deciding to minimize the punishment for a junior officer should not have been the end of the matter. CIA had an affirmative obligation to look more deeply into the leadership decisions that helped shape the environment in which the junior officer was required to operate, to examine what could have been done better, and to determine what responsibility, if any, should be fixed at a more senior level.

28. ~~(TS/~~[redacted]~~NF)~~ The Agency did better in that regard in the case of the improper capture and rendition of Khalid al-Masri, when it went on to hold those who offered flawed legal advice accountable. But in neither the [redacted] nor the al-Masri case—nor in the other cases for which the Agency conducted accountability exercises—were those with broader responsibility for the program held accountable for any management shortcomings that contributed to the outcome.

29. (U//~~FOUO~~) Although we do not believe it would be practical or productive to revisit any RDI-related case so long after the events unfolded, we do believe that, looking forward, the Agency should ensure that leaders who run accountability exercises do not limit their sights to the perpetrators of the specific failure or misconduct, but look more broadly at management responsibility and more consistently at any systemic issues. At a minimum, no board should cite a broader issue as a mitigating factor in its accountability decision on an individual without addressing that issue head on, provided it remains practical to do so.

30. (U//~~FOUO~~) Having said that, we believe the *Study* is too dismissive in general of the accountability measures taken when officers deviated from policy, regulations, or the law in their conduct of the program. As detailed in our responses to Conclusions 4 and 16, misconduct was reported to the IG, investigated, and if the allegations were substantiated, subjected to accountability review.

- ~~(S//OC/NF)~~ In addition to OIG investigations and criminal prosecutions—including an extensive, multi-year investigation of RDI activity by a Department of Justice special prosecutor, which involved the review of more than 100 detainee cases—CIA convened six accountability proceedings, either at the directorate or higher level, from 2003 to 2012.

- ~~(S//OC/NF)~~ In total, these reviews assessed the performance of 30 individuals (staff officers and contractors), and 16 were deemed accountable and sanctioned. This included administrative actions against CIA officers who engaged in unauthorized interrogation techniques as well as against officers involved in the detention of detainees who did not meet the required standard for Agency detention.

- ~~(S//OC/NF)~~ The OIG conducted two separate major reviews and at least 29 separate investigations of allegations of misconduct. Some of these reviews were self-initiated by Agency components responsible for managing the program. CIA made numerous referrals to the OIG relating to the conduct of Agency officers and their treatment of detainees, during the life of the program as well as after.

- ~~(U//FOUO)~~ CIA took corrective action both in response to OIG recommendations and on its own initiative. And when actions appeared to violate criminal prohibitions, referrals were made to the Department of Justice.

31. ~~(S//OC/NF)~~ All this oversight did, in fact, lead to tensions between CIA leaders and the OIG, owing to the sheer number of investigations underway and some concerns within the workforce about the impact on mission achievement and about the OIG's objectivity. But the dialogue that ensued did not inhibit the OIG from conducting its mission and resulted in recommended changes to the OIG's own practices that Inspector General Helgerson embraced in 2008.

32. **Contractors.** The *Study* correctly points out that the propriety of the multiple roles performed by contracted psychologists—particularly their involvement in performing interrogations as well as assessing the detainees' fitness and the effectiveness of the very techniques they had devised—raised concerns and prompted deliberation within CIA, but it fails to note that at least some of these concerns were addressed. Early in 2003, Headquarters promulgated guidance on the scope of the contractor psychologists' involvement in individual interrogations. It affirmed that no contractor could issue the psychological assessment of record.

- ~~(TS//~~[redacted]~~NF)~~ We acknowledge that the contract for the company that the two psychologists formed, [redacted] called on them to evaluate the effectiveness of the techniques they had devised, thereby creating a conflict. CIA has since taken steps to ensure that our contracts do not have similar clauses with the contractors grading their own work.

- ~~(TS/~~[redacted]~~NF)~~ The *Study's* citation of the cost of [redacted] contract requires clarification. Although the *potential* "value" of the contract was in excess of $180 million if all options had been exercised, in fact the firm was actually paid less than half of that by the time the contract was terminated in 2009.

- ~~(TS/~~[redacted]~~NF)~~ The Study's assertion that the two psychologists had "no relevant experience" is incorrect. [redacted] had the closest proximate expertise available to CIA at the time the program was authorized. They had [redacted] years of experience, respectively, with the US Air Force's Survival Evasion Resistance and Escape training program, where each of them had served as [redacted] In addition, [redacted] had conducted academic research and written a number of research papers on such topics as resistance training, captivity familiarization, and learned helplessness.

33. ~~(TS/~~[redacted]~~NF)~~ **Monetary Costs.** The *Study* suggests that CIA acted improperly when it made lump-sum payments to foreign government officials to encourage governments to clandestinely host detention sites, in some cases without requiring [redacted] Inducement payments [redacted] are neither unusual nor improper.

- ~~(S//OC/NF)~~ CIA has statutory authority to make subsidy payments to foreign officials without requiring the receiving governments to provide [redacted] CIA accounted for funds in the RDI program internally according to required procedures.

34. ~~(S//OC/NF)~~ **Relations with Partners.** In its assessment of the costs of the program, the *Study* cites "tensions with US partners and allies" and "damage to bilateral intelligence relationships with nations unwilling to provide intelligence that might contribute to CIA detention and interrogation operations." It is certainly true that CIA, as did the US Government as a whole, called on allies and friends after 9/11 to assist in a variety of ways in the fight against international terrorism. It is also true that leaks resulted in varying amounts of domestic fallout in these countries. However, the assessment of our own political analysts who had no connection to the program, as well as contemporaneous diplomatic reporting, do not support the conclusion that the leaks "strained relations" between the US and its partners. [redacted]

35. ~~(S~~[redacted]~~NF)~~ The *Study* also incorrectly characterizes the impact on our relationship with liaison partners who could not help in this area. CIA is occasionally

faced with situations in which we have authorities to undertake activities that our partners cannot or in which our partners are permitted to undertake activities that we cannot. The *Study* correctly notes, for example, that [redacted] decided not to provide "information that could lead to the rendition or detention of al-Qa'ida or other terrorists to the US Government." This decision did inhibit some potential sharing of operational information. However, the *Study* exaggerates the overall negative impact on the Agency's intelligence relationship.

- ~~(S/~~[redacted]~~NF)~~ The constraint on sharing lead information that might result in a rendition or detention did not prevent a substantial growth in overall sharing on counterterrorism after 9/11. [redacted]

36. (U/~~/FOUO)~~ Looking forward, we drew the following lessons from our review of the management and execution of the RDI program. We must:

- ~~(TS/~~[redacted]~~NF)~~ More robustly, objectively, and systematically evaluate the effectiveness of the various tools, techniques, and operations used in our covert actions.

- ~~(TS/~~[redacted]~~NF)~~ Design all covert actions under the assumption the action may eventually leak. Include an exit strategy in our planning and resist proceeding without careful policy consideration and approval of that strategy.

- ~~(S//OC/NF)~~ Try to better factor information [redacted] into the selection process for particularly sensitive assignments.

- (U/~~/FOUO~~) Further institutionalize the significant improvements made in recent years to our close relationship with OLC by establishing a formal mechanism for regularly reviewing OLC guidance to ensure that it reflects any material change in circumstance.

- (U/~~/FOUO)~~ Ensure that accountability adequately extends to those responsible for any broader, systemic or management failures, and that corrective actions are taken to address those failures.

C. (U) Contrary to CIA representations, the program failed to produce intelligence that was otherwise unavailable and that enabled CIA to disrupt plots, capture terrorists, or save lives.

37. (U/~~/FOUO)~~ Our group conducted a careful review of the *Study's* 20 examples of the value of the information CIA obtained as a result of the RDI effort, and

we have provided detailed responses to each in Tab C. We summarize below the results of our review, which are in fairly stark contrast to the *Study's* conclusions. In commenting on the value of the information derived from detainees, we are not arguing in favor of the decision to use the enhanced techniques to which these detainees were subjected. We are not endorsing those techniques, we are not making an "ends-justify-the-means" case for them, nor are we implying that those techniques were the only way to obtain the information from detainees. We only are assessing the accuracy of CIA's representations in response to the *Study's* allegations that those representations were false.

38. (U/~~/FOUO)~~ We concluded that all of the examples fit within and support CIA's overall representations that information obtained from its interrogations produced unique intelligence that helped the US disrupt plots, capture terrorists, better understand the enemy, prevent another mass casualty attack, and save lives. We must add, however, that in some of the Agency's representations it failed to meet its own standards for precision and accuracy of detail. An Agency whose reputation and value to the policymaker rests on the precision of the language it uses in intelligence reporting and analysis must ensure that such representations are as accurate as possible.

- (U/~~/FOUO)~~ Nonetheless, even in those cases, we found that the actual impact of the information acquired from interrogations was significant and still supported CIA's overall judgments about the value of the information acquired from detainees.

39. (U/~~/FOUO)~~ In one of the 20 examples, we found that CIA mischaracterized on several occasions, including in prominent representations such as President Bush's 2006 speech, the impact on specific terrorist plotting of information acquired from a set of CIA interrogations.

- (U/~~/FOUO)~~ CIA said the information "helped stop a planned attack on the US Consulate in Karachi," when it should have said it "revealed ongoing attack plotting against the US official presence in Karachi that prompted the Consulate to take further steps to protect its officers."

40. (U/~~/FOUO)~~ There were four instances in which CIA used imprecise language or made errors in some of its representations that, although regrettable, did not significantly affect the thrust of those representations.

41. (U/~~/FOUO)~~ In another four examples, we found single, isolated representations in which CIA was imprecise in describing the relative impact of the information or the manner in which it was acquired. These were not "frequently cited" or "repeatedly represented" as the *Study* asserts, and they did not appear in the President's speech.

42. (U/~~/FOUO~~) In the other 11 examples, we determined that CIA's representations were consistently accurate, contrary to the *Study's* assertion that the Agency misrepresented them all.

43. ~~(S//OC/NF)~~ One such example—the information that helped identify the courier who ultimately led CIA to Bin Ladin's compound in Abbottabad—is worth separate comment due to the Congressional and media attention it has garnered. The *Study* claims that "much of the critical intelligence on Abu Ahmed [sic] al-Kuwaiti was acquired prior to—and independently of—the CIA detention and interrogation program." We found that the intelligence the Agency had on Abu Ahmad before acquiring information on him from detainees in CIA custody was insufficient to distinguish him from many other Bin Ladin associates until additional information from detainees put it into context and allowed CIA to better understand his true role and potential in the hunt for Bin Ladin. As such, the information CIA obtained from these detainees did play a role—in combination with other streams of intelligence—in finding the al-Qa'ida leader.

- (U/~~/FOUO~~) As DCIA Panetta and ADCIA Morell have stated to Congress and publicly, it is impossible to know in hindsight whether CIA could have obtained from detainees without using enhanced techniques the same information that helped it find Bin Ladin. It is also unknowable whether the Agency eventually would have acquired other intelligence that would have allowed it to successfully pursue the Abu Ahmad lead or perhaps some other successful lead without the information acquired from detainees in CIA custody.

44. (U/~~/FOUO~~) Finally, we should note that our review showed that the *Study* failed to include instances of important information acquired from detainees that CIA cited more frequently and prominently in its representations than several of the examples the authors chose to include.

- (U/~~/FOUO~~) In the same set of documents from which the authors of the *Study* selected some representations we made only once, there are other examples we cited in those same documents seven times.

45. (U/~~/FOUO~~) In the *Study's* treatment of the 20 examples, we note a number of errors of fact, interpretation, and contextualization that appear to have led the authors to conclude that the information CIA derived in each instance had little-to-no unique value. It is just as important to note that the *Study* also discounts the aggregate impact of the intelligence derived from detainees in CIA custody.

- ~~(S//OC/NF)~~ Perhaps the most important context that the *Study* ignores in its assessment of the information obtained from detainees is how little CIA knew, despite considerable effort, about al-Qa'ida and its allies on 9/11 to inform efforts to prevent another terrorist attack. The sum total of information provided from detainees in CIA custody substantially advanced the Agency's strategic and tactical understanding of the enemy in ways that continue to allow it to disrupt al-Qa'ida's leadership and its terrorist planning to this day.

46. (U//~~FOUO~~) We do want to add, however, that in hindsight, we believe that assertions the Agency made to the effect that the information it acquired could not have been obtained some other way were sincerely believed but were also inherently speculative. Although it is indeed impossible for us to imagine how the same counterterrorism results could have been achieved without any information from detainees, we also believe—as we note above—that it is unknowable whether, without enhanced techniques, CIA or non-CIA interrogators could have acquired the same information from those detainees.

- ~~(S//OC/NF)~~ CIA officers who witnessed detainees' initial demeanor believed they would not have succumbed to less coercive approaches, at least not in time for their information to be operationally useful.

- ~~(S//OC/NF)~~ But CIA is a resourceful organization, and we believe it is unwise for its officers to make categorical and ultimately hypothetical assertions about what might or might not be accomplished using alternate means.

47. ~~(TS/~~[redacted]~~NF)~~ Looking forward, the lesson to be drawn under this theme is obvious: We must ensure that our representations of the effectiveness of covert action are drawn from assessments that are made at arm's length from the component running the program and that they adhere to the highest standards of analytic tradecraft, especially precision of language.

D. (U) CIA resisted internal and external oversight, and misrepresented the program to Congress, the Executive Branch, and the media.

48. (U//~~FOUO~~) While we were able to find points in the preceding themes with which to both agree and disagree, the *Study* seems to most seriously diverge from the facts and, indeed, from simple plausibility in its characterizations of the manner in which CIA dealt with others with regard to the RDI program. The *Study* would have the reader believe that CIA "actively" avoided and interfered with oversight by the Executive Branch and Congress, impeded other agencies, withheld information from the President, and misled the American people.

- (U//~~FOUO~~) We would observe that, to accomplish this, there would have had to have been a years-long conspiracy among CIA leaders at all levels, supported by a large number of analysts and other line officers. This conspiracy would have had to include three former CIA Directors, including one who led the Agency after the program had largely wound down.

49. (U//~~FOUO~~) We cannot vouch for every individual statement that was made over the years of the program, and we acknowledge that some of those statements were

wrong. But the image portrayed in the *Study* of an organization that—on an institutional scale—intentionally misled and routinely resisted oversight from the White House, the Congress, the Department of Justice, and its own OIG simply does not comport with the record.

- (U/~~/FOUO)~~ Many of the *Study's* charges that CIA misrepresented are based on the authors' flawed analysis of the value of the intelligence obtained from detainees. But whether the Committee accepts their assessment or ours, we still must question a report that impugns the integrity of so many CIA officers when it implies—as it does clearly throughout the conclusions—that the Agency's assessments were willfully misrepresented in a calculated effort to manipulate.

50. ~~(TS/~~[redacted]~~NF)~~ With regard to how widely CIA briefed among other agencies and the Congress, there is no question that, for sound operational and liaison equity reasons, the RDI program was extremely sensitive. As a result, the White House, which has responsibility for determining need to know for covert action, placed significant restrictions on who could be read in, limiting the oversight committees to the Chair and Vice Chair only. We do not want to suggest that CIA chafed under these restrictions; on the contrary, it undoubtedly was comfortable with them. But as we have detailed in our responses to Conclusions 3, 5, 8, and 13, briefings did occur for those the White House determined had a need to know; and in the case of briefings for the leaders of the oversight committees, those briefings occurred regularly, to include briefings from the IG about problems in the program.

- [redacted]

51. ~~(C//OC/NF)~~ Looking forward, having engaged in an effort to piece together the record of our interactions with others on this sensitive program, a key lesson we took away is that recordkeeping in the Office of Congressional Affairs and in the Office of Public Affairs on CIA's interactions with Congress and the media, respectively, should be improved. We would note, however, that Agency records were sufficient to show that CIA did not, as the *Study* alleges, intentionally misrepresent to anyone the overall value of the intelligence acquired, the number of detainees, the propensity of detainees to withhold and fabricate, or other aspects of the program.

Recommendations

52. (U) In the foregoing discussion, we have identified a number of broad lessons learned that we believe still apply to CIA today, even though the Agency has made substantial progress in a number of areas since—and in part because of—its

experience with RDI. From these lessons learned, we developed recommendations for specific, concrete actions going forward.

~~(S//OC/NF)~~ **Recommendation 1: Improve management's ability to manage risk by submitting more covert action programs to the special review process** [redacted] Direct the Executive Director, [redacted] to expand the current process of conducting special annual reviews of the execution of CIA [redacted] to include the execution of authorities that cover other particularly sensitive activities, [redacted] At the inception of a new covert action program, [redacted] would consider and recommend to DCIA whether a special review is warranted. Such operations would include, but not be limited to, those that:

- ~~(S//OC/NF)~~ Have unusually high potential, if they are disclosed or fail, to damage important US Government foreign policy interests or entail other high costs;
- [redacted]
- [redacted]
- ~~(S//OC/NF)~~ Involve unusually large expenditures of resources;
- [redacted]

~~(S//OC/NF)~~ **Recommendation 2: Better plan covert actions by explicitly addressing at the outset the implications of leaks, an exit strategy, lines of authority, and resources.** Direct the Executive Director, [redacted] to ensure that the Agency submits for inclusion in all future covert action findings a section that fully addresses the implications of unauthorized public disclosure for the program and US foreign policy, as well as a section that lays out an exit strategy and the challenges that entering into the program will pose for ending that program. Also, direct that all findings are to be accompanied by an internal use memorandum that addresses program implementation, to include lines of authority, specific organizational responsibilities for key elements of the program, and how resource requirements will be met.

~~(S//OC/NF)~~ **Recommendation 3: Revamp the way in which CIA assesses the effectiveness of covert actions.** Direct the Executive Director, [redacted] to develop within 90 days concrete options and a recommendation for a structure and/or process that would be capable of producing regular, systematic, and analytically rigorous assessments of the effectiveness of CIA covert action programs, and ensuring the accuracy and consistency of CIA representations of the same.

(U/~~/FOUO)~~ **Recommendation 4: Ensure that all necessary information is factored into the selection process for officers being considered for the most sensitive assignments.** Direct the Executive Director, working with the General Counsel and Chief of Human Resources, to develop options within 90 days for better factoring into the selection process for sensitive covert action positions relevant information [redacted] and to make a recommendation as to whether or how to amend current procedures.

(U/~~/FOUO)~~ **Recommendation 5: Create a mechanism for periodically revalidating OLC guidance on which the Agency continues to rely.** Recognizing that CIA maintains frequent communication with the Office of Legal Counsel (OLC) concerning counterterrorism and other covert action activities and the legal authorities and prohibitions governing them, direct the General Counsel to continue such communication and, working with the Executive Director, to develop a formal mechanism for triggering systematic reviews of OLC opinions regarding ongoing covert action programs with the goal of ensuring that OLC's legal analysis is confirmed or updated as warranted by material changes in facts and circumstances.

(U/~~/FOUO~~) **Recommendation 6: Broaden the scope of accountability reviews.** Direct that the Executive Director ensure that all memoranda establishing and laying out the scope of an accountability review board, including directorate level boards, explicitly call on the board to assess and make recommendations to address any systemic issues revealed by the case, and to expand the scope of the review as warranted to include officers responsible for those systemic problems.

~~(C//OC/NF)~~ **Recommendation 7: Improve recordkeeping for interactions with the media.** Direct the Director of the Office of Public Affairs (OPA) and the Chief Information Officer to develop a concrete plan to improve recordkeeping on CIA's interactions with the media. OPA's records going forward should reflect each interaction with the media and the content of that interaction. This plan should be completed within 90 days of the arrival of a new Director of OPA.

(U/~~/FOUO)~~ **Recommendation 8: Improve recordkeeping for interactions with Congress.** Direct the Director of the Office of Congressional Affairs (OCA) and the Chief Information Officer to develop a concrete plan to improve recordkeeping on CIA's interactions with Congress. OCA's records going forward should reflect each interaction with Congress and the content of that interaction. OCA should work with the oversight committees to develop better access to transcripts of CIA testimony and briefings. This plan should be completed within 90 days of the arrival of a new Director of OCA.

(U) Conclusion 1: The CIA was unprepared as it initiated a program of indefinite, clandestine detention using coercive interrogation techniques. The CIA did not adequately develop and monitor its initial detention and interrogation activities.

(U) We fully agree with Conclusion 1 of *The Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Detention and Interrogation Program* (hereafter referred to as the *Study*), as the conclusion is broadly summarized above. We have a different perspective, however, on some of the points made in the *Study's* supporting discussion for Conclusion 1.

~~(S//OC/NF)~~ CIA was indeed unprepared to initiate a rendition, detention, and interrogation (RDI) program. In response to 9/11, with the expectation that more mass casualty attacks were in the offing, CIA quickly redirected substantial resources to counterterrorism, undertook high risk operations [redacted] and enlisted the aid of liaison partners across the globe in the fight against al-Qa'ida.

~~(TS/~~[redacted]~~NF)~~ Prior to 2001, CIA had only limited experience rendering detainees [redacted] and a 1998 Memorandum of Notification (MoN) limited the Agency's authorities to detain individuals, [redacted] Following the 9/11 attacks and the President's subsequent approval of the 2001 MoN, CIA was granted unprecedented, broad authority to render individuals who "pose continuing or serious threats of violence or death to U.S. persons or interests or who are planning terrorist attacks"

- ~~(TS/~~[redacted]~~NF)~~ Almost immediately, discussions with the National Security Council (NSC) began that covered the legal and policy parameters for how al-Qa'ida and Taliban prisoners would be managed and treated by DoD and CIA. Abu Zubaydah's 28 March 2002 capture provided the impetus to draw upon those discussions and formally structure a program to render, unilaterally detain and interrogate al-Qa'ida leaders.

- ~~(TS/~~[redacted]~~NF)~~ Simultaneously, in 2001 and 2002, CIA engaged in a variety of planning efforts to develop locations and guidelines for how it would execute detention authorities and explored options with contract psychologists for interrogating al-Qa'ida members.

- (U/~~/FOUO~~) CIA faced the need to stand up a program to house and interrogate al-Qa'ida leaders and operatives [redacted] with no cadre of trained and experienced interrogators, little experience handling and moving prisoners, and no core competency in prison management. The Agency had too few analysts and linguists with the expertise required to support an RDI program.

~~(S//OC/NF)~~ We also agree with the broad conclusion that "The CIA did not adequately develop and monitor its initial detention and interrogation activities." In agreeing with this statement, however, we draw particular attention to the word "initial." As we discuss further in response to other conclusions, one of the main flaws of the *Study* is that it tars the Agency's entire RDI effort with the mistakes of the first few months. We are not minimizing the early consequences of CIA's failure to adequately manage its *initial* RDI activities, consequences that include the initial conditions and treatment of detainees at [redacted] that culminated in the death of Gul Rahman in November 2002, two months after the first detainee arrived there. But the *Study* as a whole leads the reader to believe that the management shortcomings that marked those initial months persisted throughout the program, which is historically inaccurate.

~~(S//OC/NF)~~ As noted in the *Study*, CIA sought to fill the vacuum in its RDI capabilities in part by turning to others inside and outside the government for expertise and manpower, and in part by leveraging liaison assistance. As we discuss in our response to Conclusion 15, what CIA failed to do at the outset was to immediately respond to the extraordinary and high-risk requirements of conducting RDI activities by establishing and giving adequate management attention and resources to a dedicated, centrally managed program office tasked with quickly promulgating operational guidelines for RDI activities, taking control of those activities worldwide, and monitoring those activities on a day-to-day basis.

- ~~(S//OC/NF)~~ As a result, although the confinement conditions and treatment of high profile detainees like Abu Zubaydah were closely scrutinized at all levels of management from the outset, the same cannot be said for the first couple of months of CIA's handling of lower-profile detainees in [redacted] It was during those months that grim confinement conditions and inadequate monitoring of detainees were allowed to exist at [redacted]
- While we do not minimize the gravity of the mistakes made early in the program, none of the Study's key observations relating to this period are new, but rather have been chronicled by multiple internal and external investigations

~~(TS/~~[redacted]~~NF)~~ Following the death of Gul Rahman, CIA centralized the management of and accountability for all detention facilities in a single program office, which endeavored to address the shortcomings at [redacted] as well as isolated problems elsewhere. That office also developed standards and guidelines for operating all CIA-controlled detention and interrogation facilities and monitored adherence to those guidelines.

- ~~(TS/~~[redacted]~~NF)~~ As discussed in our responses to Conclusions 15 and 19, we acknowledge that resource constraints dogged the program throughout its existence, especially in [redacted] and especially after the invasion of Iraq increased the competition for language-capable personnel. We also acknowledge that, although conditions at [redacted] improved, the Agency did not—as we believe it should have—put the facility under [redacted] the full-time management of a more senior CIA officer, as was standard practice elsewhere. The Agency was also unable to fully bring the facility up to the standard of our other detention facilities by the time it was closed in [redacted]
- ~~(S//OC/NF)~~ Nonetheless, IG reviews show that the program office substantially improved the oversight and management of the RDI program as a whole, including in [redacted] from early 2003 onward. This was not a panacea—other mistakes were made, investigated, and corrected along the way—but the program was much better developed and managed after the initial months of RDI activities.

(U/~~/FOUO)~~ With regard to some of the other claims in the *Study's* discussion of Conclusion 1:

- ~~(TS/~~[redacted]~~NF)~~ The *Study* implies that CIA's transfer of Abu Zubaydah to Country [redacted] was conducted without adequately consulting appropriate officials in the US

Government. After Abu Zubaydah was captured, CIA was forced to move quickly to identify and prepare a suitable location, and to do so with great secrecy. The Agency does not have records indicating exactly which US officials were consulted before the decision was made, but the *Study* cites documentation of Presidential approval for the plan to render Abu Zubaydah on 29 March. The *Study* also quotes from the paper CIA prepared for the Principals highlighting a range of options for his disposition. Once the plan was approved, but *before* Abu Zubaydah was transferred on [redacted] March 2002, CIA notified the Assistant Secretary of State [redacted] who pledged to brief the Secretary and Deputy Secretary, as well as [redacted] host country leaders in Country [redacted] As cited in the *Study*, no one who was briefed on the transfer objected, and several US officials were described as supportive.

- ~~(TS/~~[redacted]~~NF)~~ While we have acknowledged that CIA Headquarters in the initial months inadequately organized and monitored our RDI activities, the delegation of some select detention authorities from the DCI to Headquarters subordinates was a practical step necessitated by the pace of operations in 2002 and consistent with current practice. The Deputy Director of Operations (DDO) further delegated these authorities to CIA officers on the ground [redacted] because of the concern that situations would arise where officers could not delay action for Headquarters to deliberate and communicate capture and detention approval. That delegation was largely rescinded in June 2003, although it was recognized that unusual, exigent circumstances could still apply in isolated cases.

- ~~(TS/~~[redacted]~~NF)~~ We believe that the *Study* errs by implying that 60 individuals were detained without any review through 10 June 2003 . In fact, the vast majority of these 60 detainees were captured and initially detained [redacted] they were rendered for detention in [redacted] with Headquarters approvals. The case of Ibrahim Haqqani is also instructive. The U.S. Military captured him in Afghanistan on 4 May 2003 and brought him to [redacted] Following review at Headquarters and subsequent direction, [redacted] Station transferred him to [redacted] custody after eight days while working out approvals and logistics for subsequent transfer to U.S. Military custody, as the *Study* acknowledges, because Headquarters judged that he did not merit detention by the CIA.

~~(S//OC/NF)~~ Conclusion 2: Prior to the detention of the first CIA detainee, CIA officers began examining the legal implications of using interrogation techniques considered to be torture by foreign governments and non-governmental organizations. The CIA Office of General Counsel assessed that "a novel application of the necessity defense" could be used "to avoid prosecution of US officials who tortured to obtain information that saved many lives." After these determinations—beginning in July 2002 and continuing to the present day—the CIA has represented that the CIA's enhanced interrogation techniques were necessary to acquire "otherwise unavailable" intelligence that "saved lives."

~~(S//OC/NF)~~ We disagree with this conclusion. The draft research memorandum prepared by CIA Office of General Counsel (OGC) attorneys in 2001 (the "Draft Memo") outlined, among other things, the possibility of asserting necessity as a defense to potential criminal torture charges arising from RDI Program activities. But nothing in record indicates either that CIA relied upon the Draft Memo in implementing the RDI program or that the Draft Memo was the motivating force behind CIA's subsequent representations regarding the program.

~~(S//OC/NF)~~ First, the Draft Memo did not advise CIA to rely upon elements of the necessity defense either as a means to exonerate officers of potential criminal torture charges or as a legal basis for applying enhanced interrogation techniques to detainees. Instead, the Draft Memo pointedly stated: "In sum: US courts have not yet considered the necessity defense in the context of torture/murder/assault cases. . . . It would, therefore, be a novel application of the necessity defense to avoid prosecution of US officials who torture to obtain information that saved many lives; however, if we follow the Israeli example, CIA could argue that the torture was necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm."

- ~~(S//OC/NF)~~ Rather than advocating reliance upon a necessity defense to exonerate officers charged with torture, the Draft Memo instead warned that no US court has ever considered—let alone accepted—such a "novel"[1] argument. Although the Draft Memo further stated that CIA "could argue" such a defense under certain circumstances, the Draft Memo cannot be read to advocate reliance on the necessity defense.
- ~~(S//OC/NF)~~ In addition, the Draft Memo made clear that with reference to the experience of Israel, legal authorities there "specifically note[] that although necessity can be used as a *post factum* defense, it cannot serve as a source of positive, *ab initio* authority for the systemic (even if rare) use of torture as a valid interrogation tool." This contradicts the implication of Conclusion 2 that the Draft Memo invited reliance upon availability of a necessity defense in designing or implementing the program.

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[1] (U) In the legal context, "novel" is generally not a laudatory characterization of an argument. To the contrary, lawyers and courts typically apply the term to connote skepticism of an argument that is tenuous or untested. *See, e.g., Kingsland v. Dorsey*, 338 U.S. 318, 325 (1949) (Jackson, J., dissenting) ("If, however, a lawyer is to be called upon to be the first example of condemnation for an offense so tenuous, vague and *novel*, the least courts should require is that the case against him be clearly proved.") (emphasis added); *Mathur v. Board of Trustees of Southern Illinois University*, 317 F.3d 738, 744 (7th Cir. 2003) ("A client's case could present *novel* or untested legal theories which an attorney may not believe will be successful.") (emphasis added).

- The legal basis for the program was not a speculative "necessity defense," but rather paragraph 4 of the 17 September 2001 MoN. Enhanced techniques were one tool used to implement these authorities, and were reviewed by DoJ's Office of Legal Counsel (OLC) explicitly for the purpose of determining that they did not constitute torture or otherwise violate the law; the only conditions under which a "necessity defense" would ever, even theoretically, arise.

~~(S//OC/NF)~~ The *Study* also suggests that burnishing CIA's defense against potential criminal charges served as a motive to disseminate inaccurate information about the effectiveness of the program. In fact, the Draft Memo and CIA's research on potential criminal defenses had no bearing at all on CIA's disclosures or factual representations regarding the program, and the *Study* provides no factual support for this claim.

- ~~(S//OC/NF)~~ To support the contention that the Draft Memo motivated or colored CIA's subsequent disclosures, the *Study* quotes a 2004 email in which [redacted] CTC/LGL requested that personnel compile specific examples in which use of enhanced techniques directly led to information that saved lives. However, there is no causal link between the rather obscure 2001 Draft Memo, which set out a speculative, "novel" legal theory, and CIA's independent operational assessment that the program was effective and produced intelligence that enabled disruption of terror plots, thereby saving lives. Also absent from the *Study* is the further admonition contained in [redacted] CTC/LGL's email that any such examples provided must be "iron clad," "demonstrably supported by cable citations" or other sources, and "absolutely verifiable."

- ~~(S//OC/NF)~~ In addition, the *Study* critiques CIA—and the Draft Memo in particular—for failing to provide a "factual basis for the belief that the use of torture might be necessary to save 'thousands of lives.'" In fact, the Draft Memo professed no such belief, nor did it attempt to address the efficacy of torture as an interrogation tactic in any of its six pages. In context, the Draft Memo addressed torture "saving thousands of lives" only as a hypothetical scenario under which foreign states might be unlikely to condemn the act.

~~(TS/~~[redacted]~~NF)~~ In sum, the *Study* overstates the Draft Memo's significance. The Draft Memo and the associated MON draft legal appendix documents represented an effort by CIA to conduct initial legal research regarding the body of laws that could be applicable to the program. The Draft Memo served as an exercise to evaluate the prospect of asserting a necessity defense in the event criminal torture charges were ever asserted against CIA officers; it provided no analysis regarding the likelihood of such charges arising, the potential effectiveness of torture in obtaining intelligence, or whether particular enhanced interrogation techniques should be implemented as part of the RDI program. Moreover, it did not advocate reliance on the elements of the necessity defense to exonerate officers of potential criminal charges arising out of the RDI program or to justify the application of enhanced interrogation techniques. The Draft Memo is simply an example of Agency lawyers doing their jobs; examining all contingencies and producing legal analysis of issues of potential relevance to CIA programs.

(U) Conclusion 3: The CIA avoided Executive Branch oversight of its detention and interrogation activities by the White House and the National Security Council Principals and staff by withholding information related to the CIA detention and interrogation program and providing inaccurate information about the effectiveness and operation of the program.

(U) We disagree with the *Study's* conclusion that the Agency avoided Executive branch oversight or that it withheld or provided inaccurate information about the effectiveness and operation of the Program.

~~(S//OC/NF)~~ The record and the *Study* are replete with documentation of CIA's consultation and coordination with elements of the Executive branch, beginning as early as November 2001 with policy discussions among the various agencies on detention facilities, including multiple instances of Executive branch engagement on the detention and interrogation program. This coordination directly involved the Vice President; Counsel to the President and Vice President; the National Security Advisor and Deputy National Security Advisor; the National Security Legal Advisor; elements of the Department of Justice's Office of Legal Counsel and Criminal Division; and the Attorney General and Deputy Attorney General.

- ~~(S//OC/NF)~~The *Study* asserts that the President was not briefed in a timely way on program details. While Agency records on the subject are admittedly incomplete, former President Bush has stated in his autobiography that he discussed the program, including the use of enhanced techniques, with then-DCIA Tenet in 2002, prior to application of the techniques on Abu Zubaydah, and personally approved the techniques.

- ~~(S//OC/NF)~~The decision to delay briefing the Secretaries of State and Defense, referenced in the *Study*, was made by the White House, not CIA, which stood ready to brief them as directed. This was a Presidential program, authorized, coordinated, and administered through the President's National Security Advisor and staff. CIA did not have the unilateral authority to brief individuals or groups independent of Presidential direction as conveyed by the National Security Advisor.

(U) The Study also asserts that the CIA withheld and provided inaccurate information about the effectiveness and operation of the program. CIA's response to Conclusion 9 and Appendix A provides a detailed discussion of matters relating to the effectiveness of the program and Agency assertions regarding that issue.

(U) Conclusion 4: The CIA avoided effective oversight of its detention and interrogation activities by the CIA's Office of Inspector General. The CIA resisted efforts by the Inspector General to examine aspects of the CIA detention and interrogation program, and provided significant inaccurate information to the Office of Inspector General during the drafting of the Inspector General's Special Review of the program. The inaccurate information was included in the final May 2004 Special Review. In 2005, CIA Director Porter Goss directed the Inspector General not to initiate any new reviews of the program until it had completed the reviews already underway. In 2007, CIA Director Michael Hayden conducted an unprecedented review of the CIA's Office of Inspector General, largely in response to its inquiries into the CIA detention and interrogation program.

(U) We do not agree with the *Study's* assessment that it avoided effective oversight of its detention and interrogation activities by its Office of Inspector General (OIG). CIA engagement's with the OIG over the years was robust and the Agency did not block institutional or individual cooperation. Throughout the period, the OIG affirmed in its Semiannual Reports that it found full and direct access to all Agency information relevant to the performance of its duties. Had circumstances been otherwise, the IG would have been obligated to make that fact known to Congress. As further evidence of this access, the OIG produced a wealth of assessments, which were made available not only to CIA senior leadership but also to Congressional overseers from 2003, when the first OIG RDI-related review began, to 2012 when the last OIG RDI-related investigation was concluded. We acknowledge that two DCIA's did engage with the OIG with respect to its efforts on the RDI program, but, in both cases, this reflected an effort to find an appropriate balance between OIG's mission and those of other CIA components.

~~(S//OC/NF)~~ OIG oversight included counterterrorism audit, inspection, and numerous investigations that resulted in both positive and negative findings on the conduct of the RDI program.

- (U~~/FOUO~~)The comprehensive Special Review, *"Counterterrorism Detention and Interrogation Activities (September 2001-October 2003),"* was published in May 2004.

- ~~(S//OC/NF)~~ The OIG conducted nearly 60 investigations on RDI-related matters. In over 50, OIG found the initial allegations to be unsubstantiated or otherwise did not make findings calling for accountability review. Of the remaining cases, one resulted in a felony conviction, one resulted in termination of a contractor and revocation of his security clearances, and six led to Agency accountability reviews.

(U~~//FOUO~~) The *Study* is correct in noting that the OIG's work resulted in some tension within CIA. However, on balance we concluded that, although CIA officers may not have been comfortable engaging with the IG on RDI-related matters, when they did so they nevertheless generally provided accurate information on the operation and effectiveness of the program.

- ~~(S//OC/NF)~~ Some CIA officers clearly did perceive a lack of objectivity on the part of some OIG officers who were evaluating the program. In a memorandum for the record dated 25 August 2005, a CTC officer stated that an OIG officer opined that Gul Rahman had been "killed" and that the OIG officer "appeared to have presumed ill intent" with regard to the role of CIA officers. [redacted]

- (U~~/FOUO~~) This is only a small part of the story, however. Many OIG investigations associated with the RDI program were initiated as a result of concerns expressed by Agency employees working in the program, evidence that employees believed they could reach out to OIG and have their views taken seriously. Many allegations were found to be unsubstantiated, and did not lead to OIG Reports of Investigation.

- ~~(S//OC/NF)~~ We assess that CIA officers, with rare exceptions, provided accurate assessments to the OIG. The *Study's* assertion to the contrary is simply reflective of its more general conclusion that CIA repeatedly misrepresented the effectiveness of the program. There were two factual errors conveyed to OIG by CIA officers for the 2004 Report that we did not rectify at the time. We address both of these issues in detail in our response to the *Study's* Conclusion 9 and in our comments on the Case Studies. As discussed there, we disagree with the *Study's* overall appraisal of our representations.

- ~~(S//OC/NF)~~ Finally, it is worth highlighting that OIG reviews included instances in which the OIG recommended that individuals be reviewed for lack of candor during the course of the investigations. In four of those instances, the review process confirmed there had been a lack of full cooperation and candor, and the individuals involved were given disciplinary sanctions. Accountability is further discussed in our response to Conclusion 16.

~~(S//OC/NF)~~ The *Study's* contention that actions by two DCIAs were intended to impede OIG's activities is also flawed. DCIA Goss did send a memo on 21 July 2005 with a request that the OIG not begin new reviews of the Counterterrorism Center and instead address the backlog of uncompleted OIG RDI work. He noted that he was "increasingly concerned about the cumulative impact of the OIG's work on CTC's performance." His request came at a time when OIG claims on CTC attention and resources were growing as a result of an increasing number of reviews, some of which were taking months or longer, even as intelligence indicated, and events on the ground demonstrated, that al Qa'ida was reconstituting itself. The DCIA's request thus sought to strike a balance between the critical missions both OIG and CTC had to perform.

- ~~(S//OC/NF)~~ It is worth underscoring that DCIA Goss's request ultimately had no impact on the OIG's role. A 25 July 2005 response memo from the Inspector General (IG), in which the IG resolutely held his ground, ended the matter. Our records indicate the OIG did not halt or reduce its efforts.

~~(S//OC/NF)~~ DCIA Hayden's engagement sought to address and clarify competing missions. OIG's active posture sparked debate regarding its role vis-a-vis other CIA components. As a result, Director Hayden in 2007 initially tasked Special Counselor Robert Dietz to assess how OIG and OGC interacted on legal issues. This was intended to address the issue of whether the CIA was being caught between OIG and OGC as differing sources of "final" legal guidance. Also at the time, an Accountability Board, convened in response to an OIG report of investigation on the death of detainee Manadal al-Jamaidi, received complaints of alleged OIG bias and unfair treatment of CIA officers. Dietz was subsequently asked to include those complaints as part of his review.

- ~~(S//OC/NF)~~ Dietz's review included a number of recommendations intended to strengthen the methodology and conduct of OIG investigations, and the results of the review were reported in writing to the HPSCI and SSCI Chairmen and Vice Chairmen in January 2008.

(U/~~/FOUO)~~ The IG accepted over a dozen recommendations from the review, and implemented actions intended to clarify, document, strengthen and increase transparency, primarily related to the conduct of OIG investigations. These included:

- (U~~//FOUO)~~ Establishing the position of a Quality Control Officer in the Investigations Staff and the creation of an OIG Ombudsman position separate from the Quality Control Officer.

- (U~~//FOUO~~) Establishing procedures allowing individuals or components to provide rebuttals for the purpose of establishing factual accuracy, and establishing a uniform procedure allowing the subjects of reports the opportunity to review their interview reports and subsequent draft investigation reports.

- (U~~//FOUO)~~ Acquisition of audio/video equipment allowing for the taping of investigations interviews, to ensure accuracy and clarity, and protect both interviewees and investigators in the event of disagreements about interview content.

(U) Conclusion 5: The CIA detention and interrogation program impeded and undermined the national security missions of other Executive Branch Agencies—including the Federal Bureau of Investigation, the State Department, and the office of the Director of National Intelligence—by withholding information relevant to their missions and responsibilities, denying access to detainees, and by providing inaccurate information.

(U) We disagree with the assertion that CIA impeded or undermined the mission of other Executive Branch Agencies. In fact, intelligence derived from the detention and interrogation program greatly facilitated the work of other agencies in carrying out their national security missions. While we take no position on the decision to use enhanced techniques or on their necessity in acquiring information from detainees, we believe Conclusion 5 fails to sufficiently acknowledge the cumulative impact of intelligence obtained from those detainees on al-Qa'ida's capabilities, tradecraft, targeting priorities, and recruiting had in enabling other Executive branch agencies to develop countermeasures and disruption strategies that directly contributed to the security of the US and its interests abroad. CIA provided the interagency, including the FBI, with a wealth of information derived from detainee interrogations that was critical in shaping the whole of government response to the al-Qa'ida threat after the 9/11 attacks.

~~(S//OC/NF)~~ Prior to the capture of Abu Zubaydah in March 2002, the Intelligence Community had significant gaps in knowledge concerning al-Qa'ida's organizational structure, key members and associates, intentions and capabilities, recruitment practices and strategies, and potential targets for future attacks. To fill these gaps, CIA over the years serviced hundreds of requirements directed at detainee interrogations from the FBI, the Department of Homeland Security, the National Counterterrorism Center (NCTC), the Department of Defense, the Department of State, and the Department of Treasury, among others.

- ~~(S//OC/NF)~~ CIA shared thousands of intelligence reports obtained from detainees with the Intelligence Community, covering strategic and tactical matters related to al-Qa'ida and its militant allies and facilitators. Other agencies—including the FBI, whose cables indicate it used that information to support investigations—repeatedly made clear that it highly prized this detainee-derived intelligence.

- ~~(S//OC/NF)~~ For instance, over three quarters of the intelligence reports that the FBI cited in a paper assessing the activities of US-based al-Qa'ida sleeper operative Salih al-Marri and explaining the reach of al-Qa'ida's network in the US were sourced to Khalid Shaykh Muhammad (KSM), our first and most important source of information on al-Marri's role. Prior to KSM's information, CIA and the FBI were aware of al-Marri's links to al-Qa'ida but lacked the detail to more fully understand al-Qa'ida's plans for him.

- ~~(S//OC/NF)~~ [redacted] A separate [redacted] forwarded a CTC finished intelligence product on al-Qa'ida's evolving

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[2] [redacted]

efforts to defeat US security measures—written based on detainee reporting—and requested all consular and DHS officers at overseas posts review the report.

~~(S//OC/NF)~~ The *Study's* allegations regarding CIA's relationship with the FBI in the context of the program require clarification. In the first instance, it was the FBI's decision to exclude its personnel from participation in the RDI program, based on a leadership decision that the FBI did not want to be involved with the use of coercive techniques at secret facilities. That said, we acknowledge CIA had significant concerns regarding the possibility that any FBI participation in an interrogation might unintentionally result in later disclosures in a legal forum regarding the program and the detention site locations.

~~(TS/~~[redacted]~~NF)~~ We disagree with the characterization that the FBI received "the most significant intelligence" information from Abu Zubaydah using only rapport building techniques. The FBI officers were part of an around-the-clock effort, in conjunction with CIA, to interrogate Abu Zubaydah in order to weaken his resolve to resist. This effort involved sleep deprivation for Abu Zubaydah, which was later characterized as an enhanced technique. The FBI learned about Jose Padilla during this period of sleep deprivation, which required interrogators to alternate (so they could rest). Even after the admission concerning Padilla, both FBI and CIA interrogators assessed that Abu Zubaydah was continuing to withhold important information; an assessment that served as the impetus for seeking a DOJ opinion on additional techniques which might further weaken Abu Zubaydah's resolve.

- ~~(S//OC/NF)~~ *The Study's* allegation that CIA was directed not to share intelligence from Khalid Shaykh Muhammad's interrogations unless it was "actionable" is simply wrong. Of course, all intelligence collected from KSM was shared with the FBI via disseminated reports and [redacted] from Headquarters. The cable cited by the report is not to the contrary. It's focus is on preserving the "status quo"—in which CIA had custody of physical materials captured with KSM and information he initially provided—pending interagency discussions on how to manage those materials and information. The intent was to avoid complicating criminal trials involving other terrorist detainees, who might seek access to the materials and information through the discovery process if they were provided to the FBI. Notwithstanding this, the cable explicitly states that CIA must "continue to provide [the FBI or other law enforcement agencies] immediate access to any information" or physical materials "that relates to imminent threats or is otherwise actionable."

- ~~(S//OC/NF)~~ Finally, with regard to the *Study's* claims that the State Department was "cut out" of information relating to the program, the record shows that the Secretary of State, Deputy Secretary of State and Ambassadors in detention site host countries were aware of the sites at the time they were operational. In addition, Station Chiefs in the respective countries informed their Ambassadors of developing media, legal, or policy issues as they emerged, and provided a secure communication channel for discussion of these matters with Washington.

- ~~(TS/~~[redacted]~~NF)~~ As detailed in our response to Conclusion 3, and as is the case with all covert action programs, the National Security Council established the parameters for when and how CIA could engage on the Program with other Executive branch agencies. The 2001 MoN compartmented the rendition, detention, and interrogation program, while it permitted CIA to enlist the assistance of other relevant

US Government agencies. The NSC, not CIA, controlled access to the [redacted] within the Executive branch.

~~(TS/~~[redacted]~~/NF)~~ Overall, although we disagree with the premise that the RDI program impeded or undermined the national security missions of other Executive Branch agencies, we agree with the 9/11 Commission and others who have observed that, before 9/11, we could have been more closely linked with the FBI. Improving information sharing and operational ties in the wake of the attacks became not just a CIA priority, but a focus of the entire intelligence community. We have made great strides since then; to cite just one example, we have moved to embed significantly more FBI detailees within CIA's Counterterrorism Center (CTC)—moving from [redacted] detailees in 2003 to [redacted] today.

~~(S//OC/NF)~~ **Conclusion 6: The CIA's detention and interrogation program required secrecy and cooperation from other nations in order to operate, and both had eroded significantly before the President publicly disclosed the CIA detention and interrogation program in September 2006. It was difficult for the CIA to find nations willing to host CIA clandestine detention sites, as well as to address emergency medical care for its detainees. By 2006, the CIA detention and interrogation program had largely ceased to operate due to press disclosures, reduced cooperation from nations hosting detention facilities, the inability to find new nations to host detention sites, as well as oversight and legal concerns. After detaining at least 113 individuals, the CIA brought on six additional detainees into its custody after 2004: four in 2005, one in 2006, and one in 2007.**

~~(S//OC/NF)~~ We agree that secrecy had eroded significantly prior to the President's disclosure of the CIA detention and interrogation program in September 2006. We also share the view that identifying nations willing to host new facilities and provide emergency medical care for detainees in CIA custody grew more challenging after information about the program and other nations' participation in it leaked to the press. As information about the program became public, both CIA and our foreign partners faced worsening challenges to operational security. Further, we agree with the *Study* that by 2006 the interrogation program had largely ceased to operate, and that legal and oversight concerns were significant reasons for this.

~~(S//OC/NF)~~ We believe, however, that the *Study* omitted an additional important factor responsible for this situation: al-Qa'ida's relocation to the FATA, which was largely inaccessible to [redacted] Government of Pakistan, made it significantly more challenging to mount capture operations resulting in renditions and detentions by the RDI program.

- ~~(S//OC/NF)~~ By 2004 and especially by 2006, al-Qaida in the Afghanistan-Pakistan theater was under constant pressure from both military and intelligence operations, important leaders had been captured, cells had been neutralized, and almost all Afghan territory as well as the settled areas of Pakistan had been denied to the group. Consequently, by mid-decade the remaining senior al-Qa'ida leaders had already begun relocating to the tribal areas of Pakistan [redacted]

~~(S//OC/NF)~~ We agree with the *Study* that unauthorized disclosures about the program made it difficult for foreign governments to host detention sites, even when they were willing. However, foreign governments, including those that had hosted sites, continued to support CIA's overall counterterrorism efforts. By September 2006, CIA's program had also significantly changed from one focused on interrogation to one focused on long-term detention, due to the relative dearth of newly captured al-Qa'ida operatives. The Agency took seriously its responsibility to provide for the welfare of CIA's detainee population, including being able to address emergency and longer term medical and psychological needs. As such, when RDI managers were not confident that these needs could be met in a changing political environment in the countries where the detainees were interned, detainees were moved and facilities were closed or kept empty. (The impact of disclosures on both intelligence and foreign relations is reviewed in CIA's response to Conclusion 7).

~~(S//OC/NF)~~ Finally, the *Study* observes that CIA Directors on two occasions suspended the use of enhanced techniques, implying that these actions illustrated the tenuous nature of the legal foundation supporting the program. In fact, we believe these suspensions are further evidence of the care taken throughout the life of the program to ensure that all aspects of Agency activities remained in sync with an evolving legal and political landscape.

- ~~(S//OC/NF)~~ The first suspension occurred in May 2004 in response to the Inspector General's Special Review, as well as an internal review of the program. That internal review recommended continued use of 13 techniques, and in May 2005 DOJ provided an opinion that those 13 techniques were legal under US statutes and treaty obligations.[3]

- ~~(S//OC/NF)~~ The second suspension was in December 2005, when enactment of the Detainee Treatment Act of 2005 (DTA) was imminent. The DTA signaled Congress's declining support for this kind of program, so following an updated internal review the CIA limited to seven the types of techniques its officers could utilize. However, because of continued uncertainty over legal interpretations, use of those techniques did not immediately resume.

(U~~//FOUO)~~ As the *Study* notes, in the wake of the *Hamdan v. Rumsfeld* Supreme Court decision in 2006 and Executive Order 13440 on Common Article 3 in July 2007, DOJ issued a legal opinion finding six of the seven enhanced techniques that CIA had proposed in late 2005 were lawful. The DCIA then issued new guidelines on interrogations and allowed resumption of the permitted techniques.

~~(S//OC/NF)~~ Overall, we assess that the Agency acted prudently to voluntarily cease program operations at critical times, such as when legislation like the DTA indicated that Congress no longer supported the program, as well as when the IG identified important program shortcomings and recommended that CIA reaffirm its legal guidance.

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[3] ~~(S//OC/NF)~~ Notwithstanding this general suspension, enhanced techniques were approved on a case-by-case basis for use in the interrogation of five detainees during this period through December 2005, with Department of Justice concurrence and NSC concurrence or—beginning in September 2004—notification after DOJ approval.

~~(S//OC/NF)~~ Conclusion 7: The CIA's detention and interrogation program had significant monetary costs to the United States. Those costs included funding for the CIA to build detention facilities, including two facilities for a stated cost of nearly $[redacted] million that were never used due to political or medical care concerns. To encourage governments to clandestinely host CIA detention sites, the CIA provided cash payments, in some cases with no [redacted] At least one lump sum payment amounted to $[redacted] million. The CIA detention and interrogation program also had non-monetary costs, such as tensions with US partners and allies, formal *demarches* to the United States, and damaged bilateral intelligence relationships with nations unwilling to provide intelligence that might contribute to CIA detention and interrogation operations.

~~(S//OC/NF)~~ We largely agree with the *Study's* conclusion that the program had significant monetary costs. Lump sum payments to several countries did facilitate their willingness to host detention sites, although there was nothing improper about such payments. While the RDI program also had non-monetary costs, we believe that the *Study* overstates the damage to US relations.

~~(TS/~~[redacted]~~/NF)~~ The *Study* correctly lays out some of the significant, monetary costs associated with the detention and interrogation program over its lifespan. Between FY2001 and FY2006 – the years the program was most active–CIA's RDI program cost approximately $246.4 million, excluding personal services. To put that into context, during this same period, [redacted]

~~(S//OC/NF)~~ To encourage governments to clandestinely host detention sites, CIA provided cash payments to foreign government officials, in some cases with no [redacted] The *Study* suggests we did not properly [redacted] or that they were made in violation of government [redacted] Through legislation, however, CIA has independent authority to make subsidy payments [redacted] Such non-standard [redacted] are governed by Agency regulations that detail special approval requirements before such payments are made. In the case of the RDI program, CIA accounted for disbursed funds internally according to these required procedures, and did so in a timely manner. The Agency has no responsibility to determine or assist in overseeing our partner services' adherence to [redacted] Such payments contributed greatly to CIA's ability to influence these countries to support the RDI program as well as other [redacted] operations.

(U/~~/FOUO)~~ The *Study* also notes that there were non-monetary costs to the detention and interrogation program, citing tensions with partners and allies as well as damage to bilateral intelligence relationships. The leaks related to the detention and interrogation program at first presented challenges of varying degrees to the Agency's bilateral relationships with a number of partners, but this represents only a small part of the story.

~~(S//OC/NF)~~ As the *Study* accurately conveys, in the first years after 9/11, many foreign governments were enthusiastic about assisting CIA in prosecuting its counterterrorism mission, and most of those approached were willing to host detention facilities on the understanding that CIA would keep their cooperation secret. It was only as leaks detailing the program began to emerge that foreign partners felt compelled to alter the scope of their involvement.

~~(TS//~~[redacted]~~NF)~~ Nevertheless, [redacted] in the countries that hosted detention facilities remained supportive partners of our overall counterterrorism efforts and [redacted] assisted CIA in numerous ways. Country [redacted] maintained its close operational collaboration with CIA across a range of intelligence objectives, including counterterrorism as well as unrelated [redacted] We found no evidence that the RDI program in any way negatively affected US relations overall with Country [redacted]. Country [redacted] continued to provide high-risk support to [redacted] collection operations [redacted] Country [redacted] increased its work with CIA on other [redacted] and deepened its support to [redacted] operations even after the exposure of its role [redacted] These relationships endure and prosper today.

~~(S//~~[redacted]~~/NF)~~ The *Study* also cites costs to relationships with other US partners and allies. The *Study* singles out [redacted] countries as examples of relationships damaged by the detention and interrogation program, overstating the impact in each instance:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(U) Conclusion 8: The CIA marginalized or ignored internal criticism from interrogators, analysts, the Office of Medical Services, the Office of Inspector General, and others regarding the CIA's representations on the effectiveness and operation of the CIA's detention and interrogation program. Contrary views provided to CIA leadership were excluded from representations to the CIA's Inspector General, the White House, and others; in other instances, CIA officers recognized inaccuracies, but failed to take action to report them.

(U) We do not agree that CIA "marginalized or ignored" internal criticism of the program or otherwise sought to stifle internal debate relating to its operation or effectiveness. The *Study* attempts to support the broad finding of Conclusion 8 by citing to a compilation of isolated e-mails and informal electronic "chat" sessions between officers, but virtually all of the cited evidence is out of context, anecdotal, or simply inaccurate.

~~(S//OC/NF)~~ First, the *Study* claims that in the course of reviewing a draft Presidential speech on the Program in 2006, some CTC officers questioned the accuracy of statements in the speech indicating that Abu Zubaydah had been "defiant" in response to initial interrogation, and had declared America "weak." The *Study* alleges that these officers failed to raise the concerns with their seniors. There is no evidence, however, that officers quoted in the *Study* restrained themselves from providing feedback on these or other speech-related issues. To the contrary, their concerns were evidently clearly heard, and on September 4, 2006, CTC specifically objected to the language in the speech that the officers questioned, and provided Agency seniors, including the Director, with nine pages of other comments and corrections.

- ~~(S//OC/NF)~~ With regard to the "defiant" and "weak" references, one officer the *Study* claims failed to raise concerns sent the following to her leadership : "CIA has no documentation to substantiate page 4, lines 9-11. Abu Zubaydah employed a number of counter-interrogation techniques—including feigning ignorance, feigning neurological problems, stalling, diversions, digressions and non-specific answers—but none of the documentation describes him as `defiant' nor can we find the quote from him cited above." Upon further review of the record, this officer appears to have later changed her mind and agreed that use of the word "defiant" would in fact be appropriate.

~~(S//OC/NF)~~ Second, the fact that one officer, speaking to another in a "chat" session, felt "ostracized" for expressing his belief that Zubaydah and KSM "did not tell us everything" falls well short of establishing that the Agency "marginalized" those who criticized the Program. We do not know why the officer felt "ostracized" at that moment, but the officer's view was neither unique nor controversial; CIA never represented that detainees told us all they knew. Indeed, numerous CIA officers, including the Director of CTC, have acknowledged that detainees often withheld information they considered the most valuable. Moreover, the comment is removed from its illuminating context. A complete review of the dialogue from which the quote is taken shows that the two officers are primarily focused on expressing their dismay over the decision to cease applying enhanced techniques and the loss of important intelligence they believe will result.[4]

~~(S//OC/NF)~~ Third, we disagree with the *Study's* implication that statements made by Director Hayden to the effect that CIA held 98 detainees reflected an attempt to misrepresent the scope of the program to the incoming administration. Director Hayden did meet with CTC and other officers in January, 2009, to discuss his upcoming briefing to incoming officials. At that meeting, a CTC officer briefed the research he had performed on the number of total detainees through the life of the Program. Although this research, which indicates the total number of detainees could have been as high as 112, is heavily cited by the SSCI *Study*, SSCI neglects to point out that the findings were not final. As the briefing stated, "these numbers will continue to be refined as methodical reviews of operational records are completed and disparately compartmented information is researched and consolidated."

- ~~(TS/~~[redacted]~~NF)~~ At the time, uncertainty existed within CIA about whether a group of additional detainees were actually part of the program, partially because some of them had passed through [redacted] prior to the formal establishment of the program under CTC auspices on 3 December 2002. [redacted] was the only CIA detainee facility that housed transient [redacted] and the only one that [redacted] where complete recordkeeping was sometimes neglected. CTC's research was ultimately intended to provide a definitive answer as to how many additional detainees who passed through [redacted] in its early days, if any, should be considered to be part of the Program.

~~(S//OC/NF)~~ Officers we spoke to who were present at the 2009 meeting, including Director Hayden, recall that CTC's conclusions seemed somewhat speculative and incomplete, and that more work was required before a final number could be determined. Moreover, Hayden did not view the potential discrepancy, if it existed, as particularly significant given that, if true, it would increase the total number by just over 10 percent. The participants we spoke with who recalled the meeting agreed that there was an institutional need to bring the research into better focus and make a principled evaluation of which detainees should be considered formally part of the program, not to ignore the discrepancy or fix the number at 98 for all time.

- While it would have been more accurate to conclude at the time that the number of detainees was approximately 100, rather than falling unambiguously below that number, there was plainly no intent on the part of the Director to turn a blind eye to evidence or misrepresent the total.

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[4] ~~(S//OC/NF)~~ Immediately prior to the "ostracized" statement, one officer remarked that "if we actually capture someone important we think they are just going to tell us what they know because they like us, we are nice to them, or what? Just another example that people who make these decisions do not know what we are up against with these guys. They haven't told us all the important stuff with [EITs], they will definitely not tell us anything important without them." The other officer replied, "there are new 'influence and persuade' techniques. Essentially you're right—we're going to make them like us, and they'll tell us everything. How sophomoric!"

~~(S//OC/NF)~~ Fourth, the request by the Director of CTC (D/CTC) for officers in the field to refrain from speculating on the "legal limit" of authorized enhanced interrogation techniques was made in the context of keeping individual officers focused on their assigned tasks and areas of expertise. D/CTC relied on CIA lawyers to provide legal guidance and on CIA officers in the field and at Headquarters to implement the program within the approved guidelines set out by DOJ's OLC.

- ~~(S//OC/NF)~~ We know that some officers expressed concern about the "legal limit" of enhanced techniques, and we suspect that many more had similar reservations. CIA expects its professional cadre to be alert to potential concerns, to broadly construe their responsibilities, and to take ownership of problems. But as in any large organization, ultimately individuals must perform their assigned roles. D/CTC was simply reminding officers to permit those responsible for making legal judgments to do so.

~~(S//OC/NF)~~ Finally, the *Study* claims that CIA personnel objected to CIA's representation that the program produced intelligence leading to the thwarting of the "Dirty Bomb" plot, but Agency seniors failed to correct the record. As detailed in our Response to the Case Studies of Effectiveness, we regret that it took the Agency until 2007 to refer to Padilla without reference to the "Dirty Bomb" plot, but rather as a legitimate threat who had been directed to put together a plan to attack tall residential buildings. There was insufficient attention paid to clarifying this issue across the Agency. It does not follow, however, that there was a deliberate attempt to ignore the record or propagate misleading information.

- ~~(S//OC/NF)~~ For example, the *Study* ignores the fact that, in responding to the draft Presidential speech discussed above, the Agency proposed language that deleted the reference to Padilla as a program success story.
- ~~(S//OC/NF)~~ In addition, the evidence cited by the *Study*—including an email from the former Chief of the AZ Task Force that Zubaydah didn't provide "this is the plot" type of information—is taken out of context. The same officer also stated that Padilla's "identification would not have been made without the lead from Abu Zubaydah." Moreover, in the cited email the officer went on to describe Zubaydah as a strategically significant source of intelligence, stating that after Zubaydah received enhanced techniques, "he became one of our most valuable sources on information on al-Qa'ida players." The officer backs up that assertion with a detailed recitation of concrete ways in which Zubaydah facilitated interrogations of other detainees by providing specific information concerning their identities and plans.

~~(S//OC/NF)~~ CIA officers, who feel passionately about their mission, are not known to mince words or "keep silent," as the *Study* alleges. There is no evidence they did so here; to the contrary, some of the very emails and "chats" cited by the *Study* point to the existence of an atmosphere in which officers are unafraid to give voice to their dissenting views. Throughout the life of the program, a vibrant internal debate allowed senior CIA officers to consider and, as appropriate, accept the perspectives of field and Headquarters officers directly involved in the interrogations.

(U) Conclusion 9: The evidence the CIA provided for the effectiveness of the CIA's enhanced interrogation techniques was found to be inaccurate. From 2002 through at least 2011, the information the CIA provided to the White House, National Security Council, the Department of Justice , the Congress, the CIA Office of Inspector General, and the public on the operation and effectiveness of CIA's detention and interrogation program was consistently inaccurate. The CIA informed policymakers that the only measure of the effectiveness of the CIA's enhanced interrogation techniques was the 'otherwise unavailable' intelligence produced that 'saved lives' and enabled the CIA to 'disrupt specific terrorist plots' and 'capture' specific terrorists. A review of the 20 most frequent CIA examples provided to policymakers and others as evidence for the effectiveness of the CIA's interrogation program found all 20 representations to be inaccurate.

(U~~//FOUO~~) We conducted a careful review of the *Study's* 20 examples of the value of the information obtained as a result of CIA's RDI effort, and we have provided detailed responses to each in separate section. We have summarized our conclusions here. In commenting on the value of the information derived from detainees, we are not arguing in favor of the decision to use the enhanced techniques to which these detainees were subjected. We are not endorsing those techniques, we are not making an "ends-justify-the-means" case for them, nor are we implying that those techniques were the only way to obtain the information from detainees. We only are assessing the accuracy of CIA's representations in response to the *Study's* allegations that those representations were false.

(U~~//FOUO~~) We concluded that all the cases fit within and support the Agency's overall representations that information obtained from CIA interrogations produced unique intelligence that helped the US disrupt plots, capture terrorists, better understand the enemy, prevent another mass casualty attack, and save lives. We were dismayed to see that, in some of the Agency's representations, CIA failed to meet its own standards for precision of language and we acknowledge that this was unacceptable. However, even in those cases, we found that the actual impact of the information acquired from interrogations was significant and still supported CIA's judgments about the overall value of the information acquired from detainees, including detainees on whom the Agency used enhanced interrogation techniques.

(U~~//FOUO~~) **Summary of the 20 Examples**. In one of the 20 examples, we found that CIA mischaracterized on several occasions, including in prominent representations such as President Bush's 2006 speech, the impact of information on specific terrorist plotting acquired from a set of CIA interrogations.

- (U~~//FOUO~~) CIA said the information "helped stop a planned attack on the US Consulate in Karachi," when the Agency should have said it "revealed ongoing attack plotting against the US official presence in Karachi that prompted the Consulate to take further steps to protect its officers."

(U~~//FOUO~~) There were four cases in which CIA used imprecise language or made errors in some of its representations that, although deeply regrettable, did not significantly affect the thrust of those representations. Those cases were the arrest of Jose Padilla, the "Second Wave" plot, the arrest of Iaman Faris, and intelligence on Ja'far al-Tayyar.

(U//~~FOUO~~) In another four examples, we found single, isolated representations in which CIA was imprecise in describing the relative impact of the information or the manner in which it was acquired.

- (U//~~FOUO~~) In two of these examples, CIA made mistakes that caused the IG to incorrectly describe in its 2004 *Special Review* the precise role that information acquired from KSM played in the detention of two terrorists involved in plots against targets in the US. These were not "frequently cited" or "repeatedly represented" as *The Study* claims. Numerous other representations of one of these cases were accurate; we found no other representations for the other.

- (U//~~FOUO~~) In two cases, we found a one-time error not noted in the *Study*. In a set of talking points prepared for DCIA, CIA incorrectly said enhanced interrogation techniques played a role in acquiring two important pieces of information about KSM. In the Agency's other representations, including our most prominent, we stated correctly that this information was acquired during initial interviews of Abu Zubaydah.

(U//~~FOUO~~) In the other 11 examples, we determined that CIA's representations were consistently accurate, in contrast to the *Study*, which claims the Agency misrepresented them all.

(U//~~FOUO~~) Finally, we note that our review showed that the *Study* failed to include examples of important information acquired from detainees that CIA cited more frequently and prominently in its representations than several of the cases the authors chose to include.

- (~~S//OC/NF~~) In the same set of documents from which the authors of the *Study* selected their examples, some of which CIA only represented once, the Agency cited the disruption of the Gulf shipping plot seven times; learning important information about al-Qa'ida's anthrax plotting and the role of Yazid Sufaat seven times; and the detention of Abu Talha al-Pakistani seven times.

(~~S//OC/NF~~) **Overall Value of Detainee Reporting.** Our judgment about the worth of the intelligence acquired from the RDI Program is based on the counterterrorism value that CIA, other US government agencies, and our foreign partners derived from it. Across the life of the program, detainee-derived intelligence was responsible for:

- (~~S//OC/NF~~) *Uncovering or discovering important new information.* While a [redacted] detainee had told us of an al-Qa'ida plot to attack the US West Coast, CIA first learned about Hambali's involvement in that plotting from KSM.

- (~~S//OC/NF~~) *Making vague information actionable.* Prior to debriefings from Abu Zubaydah, the CIA had a few vague reports on a US passport holder with links to al-Qa'ida external plotting, as well as a seemingly unrelated report on a potential illegal traveler in Pakistan. Abu Zubaydah's description of Jose Padilla allowed the Agency to link him to the other reporting on the al-Qa'ida external operative, [redacted] Similarly, inconclusive HUMINT and SIGINT had alerted CIA to the existence of an al-Qa'ida external operative by the name of Ja'far al-Tayyar who spoke American-accented English and had lived in the

United States, but it was not until KSM provided biographic information on him that CIA was able to work with the FBI to specifically identify the Ja'far al-Tayyar upon whom the Agency needed to focus.

- ~~(TS/~~[redacted]~~NF)~~ *Providing strategic, contextual information.* Even detainees who did not have perishable threat intelligence often provided intelligence that advanced CIA's understanding of terrorist networks. For example, Hassan Gul's information on al-Qa'ida presence and operations in Shkai, Pakistan, was the most definitive first-hand account of the identities, precise locations, and activities of senior al-Qa'ida members in Shkai at that time. Likewise, Abu Zubaydah, KSM, Zubair, and Hambali deepened the Agency's understanding of the structure, reach and capability of al-Qa'ida and its Southeast-Asian network.
- [redacted]

~~(S//OC/NF)~~ In our review of the Study's 20 examples, we note a number of errors of fact, interpretation, and contextualization that appear to have led the authors' to conclude that the information CIA derived in each case had little to no unique value. It is just as important to note that the *Study* also discounts the aggregate impact of the information derived from detainees in CIA custody. Perhaps the most important context that the *Study* ignores is how little CIA knew, despite considerable effort, about al-Qa'ida and its allies on 9/11. The sum total of information provided from detainees in CIA custody substantially advanced the Agency's strategic and tactical understanding of the enemy in ways that continue to inform counterterrorism efforts to this day.

~~(S//OC/NF)~~ **Otherwise Unobtainable.** In hindsight, we believe that assertions that the information CIA acquired, including the critical intelligence obtained from detainees on whom the Agency used enhanced interrogation techniques, could not have been obtained some other way were sincerely believed but inherently speculative. It is impossible to imagine how CIA could have achieved the same results in terms of disrupting plots, capturing other terrorists, and degrading al-Qa'ida without any information from detainees, but it is unknowable whether, without enhanced interrogation techniques, CIA or non-CIA interrogators could have acquired the same information from those detainees. Since 2011, when then-Director Panetta publicly outlined this view, it has stood as the official Agency position, and it remains so today.

~~(S//OC/NF)~~ Conclusion 10: The CIA never conducted its own comprehensive analysis of the effectiveness of the CIA's enhanced interrogation techniques, despite a recommendation from the Inspector General and requests to do so by the National Security Advisor and the Senate Select Committee on Intelligence. The sole external analysis of the CIA interrogation program relied on two reviewers; one admitted to lacking the requisite expertise to review the program, and the other noted that he did not have the requisite information to accurately assess the program. Informal internal assessments of the effectiveness of the CIA's enhanced interrogation techniques were provided to CIA leadership by CIA personnel who participated in the development or management of the interrogation program, as well as by CIA contractors who had a financial interest in the continuation and expansion of the CIA detention and interrogation program.

~~(TS/~~[redacted]~~NF)~~ We agree with Conclusion 10 in full. It underpins the most important lesson that we have drawn from *The Study*: CIA needs to develop the structure, expertise, and methodologies required to more objectively and systematically evaluate the effectiveness of our covert actions.

(U/~~/FOUO)~~ We draw this lesson going forward fully aware of how difficult it can be to measure the impact of a particular action or set of actions on an outcome in a real world setting. This was very much true for enhanced techniques. A systematic study over time of the effectiveness of the techniques would have been encumbered by a number of factors:

- (U~~//FOUO)~~ The variability of each detainee's personality, state of mind at capture, ideological commitment, and the importance of the information he was attempting to conceal.
- (U/~~/FOUO)~~ Federal policy on the protection of human subjects and the impracticality of establishing an effective control group.
- (U~~//FOUO)~~ The difficulty in isolating the impact of any given technique or set of techniques from the cumulative impact of the overall experience, which from the moment of capture was structured to induce compliance and resignation.
- (U~~//FOUO)~~ Variations in the manner in which enhanced techniques were administered, the types of techniques favored over time, the skill with which they were used, the substantive expertise and interpersonal skills of the debriefers, as well as the baseline of intelligence pertinent to any given detainee.
- (U~~//FOUO)~~ The need to devote to mission execution the analytic resources that might have been used in an evaluation program, especially during the years just after 9/11 when CIA was recovering from a depletion of its personnel resources during the 1990s.
- (U~~//FOUO)~~ The need for secrecy and the consequent requirement for strict compartmentation of the information required to evaluate it.

~~(S//OC/NF)~~ These hindrances notwithstanding, we believe that CIA should have attempted to develop a more sustained, systematic, and independent means by which to evaluate the effectiveness of the approaches used with detainees.

- ~~(S//OC/NF)~~ CIA remains grateful to [redacted] and [redacted] who applied their considerable experience in program oversight as effectively as they could to the task of providing overviews of the effectiveness of enhanced techniques. Their reports offered important insights. We agree with the *Study*, however, that they were heavily reliant on the views of the practitioners, and that this short-term effort was no substitute for a more sustained and systematic evaluation of the program.

- ~~(S//OC/NF)~~ As discussed in our response to Conclusion 17, we agree that CIA should have done more from the beginning of the program to ensure there was no conflict of interest—real or potential—with regard to the contractor psychologists who designed and executed the techniques while also playing a role in evaluating their effectiveness, as well as other closely-related tasks.

~~(S//OC/NF)~~ Although no systematic, comprehensive assessment of the effectiveness of various techniques was performed, as it should have been, officers involved in the program did regularly make such assessments on an ad hoc basis in an effort to achieve the best results with the least coercion. Officers concluded that various enhanced techniques were effective based on their own "before and after" observations.[5][6] A number of officers, having witnessed detainees' initial demeanor, believed that they would not have succumbed to less coercive approaches, at least not in time for their information to be operationally useful. [7][8]

- ~~(S//OC/NF)~~ Corporately, however, CIA has concluded that is impossible in hindsight to know whether intelligence as valuable as that summarized in our response to Conclusion 9 and in our responses to the case studies could have derived by using less coercive techniques.

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[5] [CIA | [redacted]41373 | | [redacted] | | | | ~~(TS/~~[redacted]~~NF)~~ |]
[6] [CIA | 41484 | | | | | | ~~(TS/~~[redacted]~~NF)~~ |]
[7] [CIA | 10496 | | 16 February 2003 | | | | | ~~(TS/~~[redacted]~~NF) |~~]
[8] [CIA | HEADQUARTERS[redacted] | | | | ~~(TS/~~[redacted]~~NF)~~ |]

(U) Conclusion 11: In its representations about its interrogation program the CIA did not inform policymakers and others that CIA detainees fabricated information during and after the use of the CIA's enhanced interrogation techniques. CIA detainees also withheld information, notwithstanding the use of such interrogation techniques. Multiple CIA personnel directly engaged in the CIA interrogation program stated that the CIA's enhanced interrogation techniques were ineffective in eliciting increased cooperation or obtaining accurate information from CIA detainees.

~~(S//OC/NF)~~ We believe the *Study* is wrong in asserting that CIA failed to inform policymakers and consumers of detainee-related intelligence about fabricated information. The CIA took pains to ensure that all involved were fully aware from the outset that detainees might fabricate and withhold information, and CIA reporting carried clear warnings of this possibility. Senior CIA officers also shared this assessment in meetings with Congressional overseers. Unsurprisingly, throughout the course of their detention, detainees frequently both lied and told the truth, and CIA worked diligently to discern the difference, engaging in detailed analysis of the data available from all streams of reporting.

~~(S//OC/NF)~~ CIA detainee reports clearly specified that the source was a detainee and that the information was gained during custodial debriefings. Reports included warnings that the detainees may have intended to influence as well as inform, intentionally withhold information, and employ counter-interrogation techniques. CIA included additional information as circumstances warranted—for example, when a detainee changed his claims over time. These caveats are attached at the bottom of our response to Conclusion 11.

~~(S//OC/NF)~~Evaluating the truthfulness of sources is an integral part of HUMINT collection and analysis tradecraft. The reality that detainees lied or changed their accounts, with or without being subjected to enhanced techniques, did not come as a shock to anyone involved in the program or to consumers of detainee-derived intelligence. The *Study* generally appears to accept at face value detainees' accounts that they lied under enhanced techniques and told the truth afterwards. However, in some cases comparing information provided by a detainee to intelligence from other sources indicates that detainees told the truth after undergoing enhanced techniques and then, perhaps regretting what they had revealed, tried to rescind it later.

- ~~(S//OC/NF)~~ For example, after being subject to enhanced techniques, Hambali admitted that the 16 Malaysian students whom he had hand selected for participation in a cell in Karachi, Pakistan were being groomed as pilots—probably as part of a plot to attack the west coast of the United States, in response to KSM's request. Months later, Hambali claimed he lied about the pilots because he was "constantly asked about it and under stress" and stated that KSM never asked his assistance in identifying a pilot. CIA assesses that Hambali's recantation was a lie, because his claim directly contradicts information provided by KSM, Hambali verified his original admission in multiple instances, and because of independently-obtained intelligence confirming the cell members' interest in aircraft and aviation.

~~(S//OC/NF)~~ When detainees fabricated or retracted information, CIA issued new or revised reports with that information. However, the Agency's general practice was not to recall the original reports. IC terrorism analysts preferred that the original reports remain available, because they gained important insights from understanding the choices detainees made in formulating their fabrications. In one case—Abu Faraj's false statement that he did not recognize a courier—analysis of the fabrication contributed to the hunt for Usama bin Laden.

~~(S//OC/NF)~~ As we have stated elsewhere and publicly, CIA will never know whether use of enhanced techniques resulted in more actionable or truthful information than otherwise would have been available. But the fact that some detainees successfully withheld information does not, by itself, invalidate the program. As we noted in a 2004 monograph, "[t]he interrogation techniques. . . in and of themselves provide no silver bullet." The purpose of the program was to minimize what was withheld with the understanding that obtaining complete disclosures from detainees in every case was not possible.

Caveats and Corrections in Detainee Reporting

~~(S//NF)~~ All disseminated reports from detainees clearly specified that the source was a detainee and carried a warning notice indicating specific caveats regarding potential unreliability. The report text always specified that the information was gained during a custodial debriefing. The bullets in the *Study* under Conclusion 11 also cite several cases where a detainee changed his information in the course of interrogation. We highlight a number of specific examples below:

- ~~(S//NF)~~ **General Caveat.** The following caveat was the basic version and was used on most reporting from detainees. This example is drawn from a report from Khalid Shaykh Muhammad:

  > *THE FOLLOWING COMMENTS FROM SENIOR AL-QA'IDA OPERATIONAL PLANNER KHALID SHAYKH ((MUHAMMAD)) AKA ((MUKHTAR)) MAY HAVE BEEN MEANT TO INFLUENCE AS WELL AS INFORM. MUKHTAR HAS ALSO BEEN KNOWN TO INTENTIONALLY WITHHOLD INFORMATION AND EMPLOY COUNTERINTERROGATION TECHNIQUES.*

- ~~(S//NF)~~ **Samir Hilmi 'Abd al-Latif al-Barq.** The following caveat appeared even in the earliest reporting from Samir Hilmi 'Abd al-Latif al-Barq, who during his interviews frequently changed his account of his involvement with anthrax:

  > *THE FOLLOWING COMMENTS FROM A MID-LEVEL AL-QA'IDA ASSOCIATE MAY HAVE BEEN MEANT TO INFLUENCE AS WELL AS INFORM. THE DETAINEE ALSO MAY HAVE BEEN INTENTIONALLY WITHHOLDING INFORMATION. AS DEBRIEFINGS WITH THIS DETAINEE CONTINUE, HIS ACCOUNT OF EVENTS ARE AND MAY CONTINUE TO EVOLVE AND CHANGE.*

- ~~(S//NF)~~ **'Abd al-Rahim al-Nashiri.** The *Study* notes, based on [redacted] 10216 [redacted] [redacted] that 'Abd al-Rahim al-Nashiri recanted information on terrorist operations targeting Jeddah, Saudi Arabia. (NOTE: The footnote on p. 1404, Vol. 3, of the study incorrectly cites [redacted] 10220 as the source of the quotation.) The following language was added to a caveat in a revised report [redacted] alerting the IC to 'abd al-Rahim al-Nashiri's retraction of information on terrorist operations in Jeddah, Saudi Arabia.

  > ~~(S//~~[redacted]~~/NF)~~ *UPON FURTHER CUSTODIAL INTERVIEWS, THE SENIOR OPERATIVE RETRACTED HIS STATEMENTS REGARDING THE INVOLVEMENT OF TWO SAUDI AL-QA'IDA MEMBERS IN POSSIBLE ATTACKS AGAINST US VEHICLES IN JEDDAH.*

- ~~(S/~~[redacted]~~/NF)~~ **Majid Khan.** The *Study* says that Majid Khan retracted "a lot of his earlier reporting." [redacted] provides an example of such a retraction.

  > *(CONTEXT STATEMENT: THE FOLLOWING COMMENTS ARE FROM DETAINED AL-QA'IDA OPERATIVE ((MAJID KHAN)), AKA ADNAN, WHO WAS CAPTURED IN MARCH 2003 AND WAS AWARE HIS STATEMENTS WOULD REACH US GOVERNMENT OFFICIALS AND MAY HAVE INTENDED HIS REMARKS TO INFLUENCE RATHER THAN INFORM. MAJID KHAN HAS BEEN UNCOOPERATIVE DURING DEBRIEFINGS AND ADMITTED TO WITHHOLDING INFORMATION. WHEN ASKED FOR FURTHER DETAILS REGARDING THIS PARTICULAR THREAT, MAJID STATED HIS IMPLICIT INTENTION TO LIE TO DEBRIEFERS. AS SUCH, WE ASSESS THAT THE FOLLOWING THREAT INFORMATION PROVIDED BY MAJID MAY LIKELY HAVE BEEN FABRICATED, HOWEVER BECAUSE WE CANNOT DISPROVE THIS INFORMATION WITH COMPLETE CERTAINTY, WE ARE REPORTING IT FOR THE RECORD. DUE TO MAJID'S LACK OF CREDIBILITY, WE DO NOT INTEND TO FURTHER DISSEMINATE THIS INFORMATION IN AN FOUO TEARLINE.)*

- ~~(S//NF)~~ **Ramzi bin al-Shibh.** The *Study* notes, based on [redacted]10633 (1 Mar 03), that Ramzi bin al-Shibh recanted information on al-Qa'ida nuclear projects. This information was disseminated on 18 October 2002 in [redacted] and was formally recalled on 7 May 2003 with the following notice:

  > *TEXT: NOTICE: AN INFORMATION REPORT WITH THE ABOVE HEADING AND SERIAL NUMBER [redacted] WAS ISSUED ON 18 OCTOBER 2002 AS [redacted] 529921, [redacted] BECAUSE THE SENIOR AL-QA'IDA OPERATIVE SUBSEQUENTLY SAID HE HAD LIED, THIS REPORT IS BEING RECALLED. RECIPIENTS SHOULD DESTROY ALL HARD COPIES OF THE REPORT AND REMOVE IT FROM ALL COMPUTER HOLDINGS. RECIPIENTS SHOULD ALSO PURGE ANY FINISHED INTELLIGENCE PUBLICATIONS WHICH DREW ON THIS REPORT.*

  - ○ ~~(S//NF)~~ The following information was disseminated in [redacted]

    > *DURING AN EARLY OCTOBER 2004 CUSTODIAL INTERVIEW, BIN AL-SHIBH CLAIMED THAT HE HAD NO KNOWLEDGE OF ANY SPECIFIC AL-QA'IDA EFFORT TO ACQUIRE NUCLEAR MATERIAL OR WHETHER ANY INDIVIDUALS ASSOCIATED WITH AL-QA'IDA HAD EVER ACQUIRED NUCLEAR MATERIAL. BIN AL-SHIBH SAID HE HEARD OF ABU HAFS AL-MASRI'S DEATH THROUGH THE MEDIA AND KNEW NOTHING REGARDING THE EVACUATION OF HIS RESIDENCE. BIN AL-SHIBH STATED THAT PRIOR TO HIS RETURN TO GERMANY IN EARLY 2001, ABU HAFS AL-MASRI TASKED HIM TO FIND A PHYSICIST WHO WOULD BE WILLING TO HELP AL-QA';IDA. BIN AL-SHIBH SAID HE NEVER FOUND A PHYSICIST TO ASSIST AL-QA'IDA BECAUSE HE DID NOT LOOK FOR ONE. [redacted] SEE [redacted] DATED 9 JULY 2004, FOR PREVIOUS REPORTING ON BIN AL-SHIBH'S COMMENTS ON ABU HAFS AL-MASRI'S TASKING TO RECRUIT A PHYSICIST IN GERMANY.)*

  - ○ ~~(S/~~[redacted]~~/NF)~~ Furthermore, Ramzi's reliability was questioned in the very first report from him [redacted] which stated:

> *DURING A 13 SEPTEMBER 2002 INITIAL CUSTODIAL INTERVIEW, AL-QA'IDA OPERATIVE RAMZI BIN AL-SHIBH AKA UBAYDAH DENIED HAVING ANY KNOWLEDGE OF PLANNED FUTURE TERRORIST OPERATIONS. BIN AL-SHIBH WAS UNCOOPERATIVE THROUGHOUT THE INTERVIEW, APPEARED TO FABRICATE SOME DETAILS, AND WITHHELD SIGNIFICANT INFORMATION ON RELEVANT SUBJECTS.*
>
> *~~(S//~~[redacted]~~/NF)~~ UPON FURTHER CUSTODIAL INTERVIEWS, THE SENIOR OPERATIVE RETRACTED HIS STATEMENTS REGARDING THE INVOLVEMENT OF TWO SAUDI AL-QA'IDA MEMBERS IN POSSIBLE ATTACKS AGAINST U.S. VEHICLES IN JEDDAH.*

- E. ~~(S/~~[redacted]~~/NF)~~ **Muhammad Sayyid Ibrahim.** The *Study* notes, based on [redacted] 1347 [redacted] that Ibrahim "retracted claims he had made about meeting with a senior al-Qa'ida leader… because 'interrogators forced him to lie.'" However, claiming to be "forced to lie" is a known counter-interrogation technique that is not unique to CIA's program. Only two days later [redacted] 1365 [redacted] recorded that:

> *[IBRAHIM] CLAIMED THAT HE WAS PREPARED TO START TELLING THE TRUTH AFTER WARNINGS THAT HIS SITUATION WOULD CONTINUE TO DETERIORATE IF HIS UP AND DOWN ANTICS OF THE PAST WEEK CONTINUED. [HE] BEGAN TO RESPOND TO QUESTIONING BY INTERROGATORS AND SUBSTANTIVE EXPERT [NAME REDACTED], VOLUNTEERING BACKGROUND TO SUPPORT MANY OF HIS POINTS, APPEARING TO STRAIN ON OCCASION TO COME UP WITH A NAME OR TO RECALL DETAILS OF A CONVERSATION, AND OCCASIONALLY IDENTIFYING AREAS WHERE HE HAD PROVIDED FALSE INFORMATION IN THE PAST.*

  - ~~(S//~~[redacted]~~/NF)~~ Information from Ibrahim was disseminated with the standard caveats.

- F. ~~(S/~~[redacted]~~/NF)~~ **Hambali.** The *Study* notes only that "Hambali stated that he fabricated information"; no specifics are given. An example of a corrected version of a Hambali report is [redacted] which contained the following language:

> *THIS REPORT IS BEING REISSUED TO PROVIDE ADDITIONAL DETAILS OBTAINED DURING LATE NOVEMBER 2003 DEBRIEFINGS, SEE PARAGRAPH 11. IN LATE NOVEMBER, THE DETAINEE REVERSED PREVIOUS STATEMENTS AND CLAIMED THAT HE HAD NOT ATTEMPTED TO RECRUIT ABDUL KHOLIQ TO ASSIST IN DEVELOPING OR ACQUIRING WMD, NOR HAD HE AND YAZID SUFAAT EVER DISCUSSED WMD WITH KHOLIQ.*
>
> [redacted] *WE ARE CONTINUING TO REVIEW THE BELOW ACCOUNTING FROM THE DETAINEE AND WILL PROVIDE FURTHER DETAILS AS THEY BECOME AVAILABLE.) DURING LATE NOVEMBER 2003 DEBRIEFINGS, THE DETAINEE CLAIMED THAT HE FABRICATED PREVIOUS INFORMATION CONCERNING THE INVOLVEMENT OF ABDUL KHOLIQ IN AL-QA'IDA'S EFFORTS TO ACQUIRE AND/OR DEVELOP WMD. SPECIFICALLY, THE DETAINEE STATED THAT HE HAD TWICE MET WITH KHOLIQ, SUBJECT OF PARAGRAPHS 3 AND 5, BUT THAT THESE MEETINGS TOOK PLACE IN SEPTEMBER 1999, VICE 2000. IN ADDITION, THE DETAINEE STATED THAT HE AND YAZID SUFAAT DID NOT USE*

> *EITHER VISIT TO EVALUATE KHOLIQ AS A POTENTIAL WMD ACCOMPLICE OR TO DISCUSS WMD, BUT RATHER HAD ONLY VISITED KHOLIQ TO TALK ABOUT BUSINESS OPPORTUNITIES. FINALLY, THE DETAINEE RECANTED ON THE INFORMATION CONTAINED IN PARAGRAPHS 4, 5, AND 6, STATING THAT HE HAD FABRICATED THE DISCUSSION OF SARIN GAS, TALK OF SETTING UP A LAB WITH ABDUL KHOLIQ, AND HIS PRIOR CLAIM THAT SUFAAT THOUGHT THAT KHOLIQ WAS "VERY CLOSE," IN TERMS OF CAPABILITIES, TO WHAT THEY NEEDED TO ESTABLISH WMD PRODUCTION. THE DETAINEE ALSO CLAIMED HE FABRICATED THE INFORMATION CONTAINED IN PARAGRAPH 10.)*

- ~~(S//~~[redacted]~~/NF)~~ **Khalid Shaykh Muhammad.** With regard to Jaffar al-Tayyar, Majid Khan, and the Heathrow and gas station plots, the *Study* notes, based on [redacted] 10906 (20 Mar 03), that "...MUKHTAR RECANTED HIS PREVIOUS ASSERTIONS THAT AL-TAYYAR IS/WAS INVOLVED IN THE HEATHROW OPERATION AND THE MAJID KHAN PLOT TO BLOW UP GAS STATIONS..." The study also quoted [redacted] 10894 (22 Jun 03), which stated that "[KHALID SHYAKH MUHAMMAD] ALSO ADMITTED THAT HIS DECISION TO INCLUDE JAFFAR AL-TAYYAR IN THE MAJID ((KHAN)) PLOT INSIDE THE UNITED STATES...WAS A COMPLETE FABRICATION." Revised information on the Heathrow plot was disseminated in [redacted]

> *DURING A CUSTODIAL INTERVIEW ON 18 MARCH 2003, MUKHTAR PROVIDED ADDITIONAL INFORMATION ON THE OPERATIVES HE IDENTIFIED TO PARTICIPATE IN THE ATTACK ON HEATHROW AIRPORT....ALTHOUGH MUKHTAR PREVIOUSLY STATED THAT JAFAR AL-((TAYYAR)) WAS INVOLVED IN THE LONDON CELL, HE RETRACTED THIS ASSERTION....*

  - Revised information on the gas station plot was disseminated in [redacted]

> *MUKHTAR REITERATED THAT HIS MAIN PLAN FOR MAJID KHAN WAS TO PURSUE THE PLOT OF BLOWING UP SEVERAL GASOLINE STATIONS IN THE UNITED STATES. HOWEVER, MUKHTAR ADMITTED THAT, IN FACT, HE NEVER INTENDED FOR AL-QA'IDA OPERATIVE JAFFAR AL-((TAYYAR)) TO PARTICIPATE IN THESE OPERATIONS.*

  - With regard to Abu Issa, and Black Muslims in Montana: the *Study* states that Khalid Shaykh Muhammad recanted statements that he directed Abu Issa to convert Black Muslims in Montana. The report cites [redacted] 12198 (3 Jul 03) as the source of that information. The revised information was disseminated in [redacted] and [redacted]

> *REGARDING THE ALLEGATION THAT ISSA HAD MENTIONED BLACK MUSLIM CONVERTS WITH FAMILY IN MONTANA WHO WORKED AS BODYGUARDS FOR SHAYKH ((ABU HAMZA AL-MASRI)), THE DETAINEE CONFIRMED THAT ISSA TOLD HIM ABOUT THE BODYGUARDS, AND SAID THAT HE BELIEVED THIS CAME UP WHEN HE SUGGESTED ISSA FIND SOMEONE IN THE UNITED KINGDOM WHO COULD HELP HIM SET UP THE MULTIPLE INCENDIARY DEVICES HE HAD CONCEIVED IN HIS PLAN. THE DETAINEE SAID THERE WAS NO*

CONNECTION BETWEEN THE BODYGUARDS MENTIONED BY ISSA AND MONTANA.

THE DETAINEE CLARIFIED THAT HE DID NOT ASK ISSA TO RECRUIT AFRICAN-AMERICAN MUSLIMS IN MONTANA, BUT RATHER ISSA MENTIONED HE KNEW AN AFRICAN-AMERICAN MUSLIM IN MONTANA THROUGH HIS CONTACTS IN THE UNITED KINGDOM. THE DETAINEE SAID HE WAS ORIGINALLY CONFUSED ABOUT THIS ISSUE.

(U) Conclusion 12: The CIA provided inaccurate information to the Department of Justice on the way in which interrogations were conducted, the conditions of confinement, and the effectiveness of the CIA's enhanced interrogation techniques. The Department of Justice relied on CIA's factual representations to support its conclusions that the program was consistent with U.S. statutes, the U.S. Constitution, and U.S. treaty obligations, and warned the CIA that if facts were to change, its legal conclusions might not apply.

~~(S//OC/NF)~~ CIA did not consistently or intentionally provide inaccurate information to DOJ. While stronger communication and coordination between CIA and DOJ's Office of Legal Counsel (OLC) would have enabled OLC's legal guidance to reflect more up-to-date factual information, we found no evidence that any information was known to be false when it was provided or that additional or more frequent updates would have altered OLC's key judgments.

- ~~(S//OC/NF)~~ For example, prior to issuance of OLC's 1 August 2002 opinion, CIA represented that "[enhanced techniques] will not be used with substantial repetition" as applied to any one detainee. As the program evolved, in certain exceptional cases—particularly involving the waterboard, which was applied to three detainees—the number of repetitions was inconsistent with this assertion. However, OLC made clear that the precise number of applications of the waterboard did not contravene OLC's guidance. The *Study* itself, summarizing a 2004 memorandum from OLC to the CIA IG, states:

> The memorandum explained that the Attorney General had expressed the view that the legal principles in the OLC opinion would allow the same techniques to be used on detainees other than Abu Zubaydah and that the repetitions in the use of the waterboard on Khalid Shaykh Muhammad and Abu Zubaydah did not contravene the principles underlying the August 2002 opinion.

~~(S//OC/NF)~~ Similarly, the *Study* emphasizes that in seeking initial legal guidance from OLC regarding interrogation techniques, CIA represented that it believed Abu Zubaydah was al-Qa'ida's third- or fourth-ranking leader. The *Study* alleges that CIA learned Zubaydah was not actually a formal member of al-Qa'ida prior to issuance of the August 2002 opinion, and failed to share this new information with DOJ. The implication is that had this information been made available, the guidance provided would have been different. While we acknowledge the Agency should have kept OLC more fully informed, neither the documents cited in the *Study* nor CIA's contemporaneous analytic judgments support the *Study's* conclusion.

- ~~(S//OC/NF)~~ As a threshold matter, the *Study* incorrectly claims that CIA's view of Abu Zubaydah's importance to al-Qa'ida was based solely on a single source who recanted. In fact, CIA had multiple threads of reporting indicating that Zubaydah was a dangerous terrorist, close associate of senior al-Qa'ida leaders, and was aware of critical logistical and operational details of the organization, whether or not he held formal rank in al-Qa'ida. Analysts did not alter their fundamental assessment of Zubaydah's intelligence value as a result of anything said or later recanted by the single source cited by the *Study*.

- ~~(S//OC/NF)~~ Moreover, it is important to note that there are no facts suggesting that the conclusions in the August 2002 opinion were dependent on CIA's representation about Abu Zubaydah's rank. In fact, the Attorney General later extended the opinion to other detainees for which no such representations were made. In 2003 he explicitly reaffirmed that the "legal principles reflected in DOJ's specific original advice could appropriately be extended to allow use of the same approved techniques (under the same conditions and subject to the same safeguards) to other individuals besides the subject of DOJ's specific original advice."

- (U/~~/FOUO~~) More generally, the *Study* seems to misunderstand the role of OLC and its interaction with CIA. OLC is not an oversight body, and it does not act as a day-to-day legal advisor for any executive agency. Further, OLC does not "approve" executive agency activities. Instead, when requested and otherwise appropriate, OLC provides legal guidance and analysis to executive agencies on specific questions of law applicable to specific and defined sets of facts. It then is incumbent upon Executive agencies to apply OLC legal guidance to their activities. In doing so, agencies, including CIA, will often apply the legal guidance provided in a particular OLC memorandum to other similar factual scenarios. It is neither practical nor required for an agency to seek prior OLC legal review of all possible factual scenarios.

~~(TS//~~[redacted]~~NF)~~ In other instances cited by the *Study*, new or different information was only discovered *after* the issuance of applicable DOJ opinions. For example, the *Study* notes that CIA sought and obtained from DOJ authorization to use enhanced interrogation techniques on Janat Gul based on what turned out to be fabricated source reporting. As the *Study* itself acknowledges, however, this fabrication was not discovered until "[a]fter the CIA's use of its enhanced interrogation techniques on Gul."

~~(S//OC/NF)~~ The *Study* mischaracterizes as inaccurate certain other representations CIA provided to DOJ by either omitting or inaccurately describing the surrounding context.

- ~~(S//OC/NF)~~ With regard to Abu Zubaydah, the *Study* claims that CIA's representation to OLC that it was "certain" Abu Zubaydah was withholding information on planned attacks was inaccurate, pointing to an "interrogation team" cable in which the team describes their objective as merely to *ensure* Abu Zubaydah was not holding back. The *Study*, however, neglects to relate critical elements later in the cable that go on to say that "[t]here is information and analysis to indicate that subject has information on terrorist threats to the United States"; and "[h]e is an incredibly strong willed individual which is why he has resisted this long".

- ~~(S//OC/NF)~~ The *Study* also notes that CIA inaccurately informed OLC in September 2004 that Ahmed Khalfan Ghailani was believed to have intelligence on individuals trained for an attack and may have been involved in attack plotting, despite "an email sent almost a month before the OLC letter indicat[ing] that this was speculation." The email referenced states only that Ghailani's specific role in operational planning was unclear, and then goes on to add that, "[i]n particular, Ghailani may know the identities and locations of operatives who trained in Shkai. He also may know aliases and intended destinations for these operatives...." Read in full, the underlying email fully supports CIA's representation regarding the intelligence Ghailani was believed to possess.

- ~~(S//OC/NF)~~The *Study* points to alleged misstatements by CIA in late 2005 and early 2006 regarding conditions of confinement. It asserts CIA inaccurately represented that certain conditions—such as constant light, white noise, and the shaving of detainees—

> were used for security purposes when, in fact, the record indicates they were also used for other purposes related to interrogation. These assertions take CIA's representations out of context, as they originated from communications with OLC regarding which measures would be *necessary* for security purposes, without excluding any other ancillary purposes they might serve. Indeed, we were unable to find any representation by CIA that security was the sole purpose of these measures. Moreover, in April 2006, CIA sought to specifically clarify this issue with OLC when it became clear this concept was not well understood. Responding to a draft OLC opinion, CIA stated, "Overarching issue. This opinion focuses exclusively on the use of these conditions for the security of the installation and personnel. However, these conditions are also used for other valid reasons, such as to create an environment conducive to transitioning captured and resistant terrorists to detainees participating in debriefings."

(U~~//FOUO~~) Finally, the *Study* generally alleges that representations made to OLC prior to its May 30, 2005 opinion regarding the importance of intelligence obtained as a result of the program in thwarting various terrorist plots were inaccurate. The Agency's refutation of charges that it misrepresented the value of program-derived intelligence is presented in Appendix B.

(U~~//FOUO~~) CIA at all times sought to obtain legal guidance from DOJ based on the best information then available. Nevertheless, it is clear the Agency could and should have taken greater steps to support the integrity of the process and guarantee transparency, both in fact and in appearance, by occasionally revisiting its factual representations and updating them as necessary—even when doing so would not have had a practical impact on the outcome.

(U) Conclusion 13: The CIA actively impeded Congressional oversight of the CIA detention and interrogation program. In 2002, the CIA avoided and denied then-Chairman Bob Graham's oversight requests for additional information about the program, and later resisted efforts by then-Vice Chairman John D. Rockefeller IV to investigate the program. The CIA restricted briefings of the CIA interrogation program to the Chairman and Vice Chairman of the Senate Select Committee on Intelligence until September 6, 2006, the day the President of the United States publicly acknowledged the program. Prior to that time, the CIA declined to answer all questions from other Committee members. Once the full membership of the Committee was briefed, the CIA continued to impede Committee oversight by restricting the members' staff from being "read-in" to the program, delaying and denying the provision of information on the program, and refusing to respond to formal Committee questions for the record. Information the CIA did provide on the operation and effectiveness of the CIA detention and interrogation program was largely inaccurate from 2002 through at least 2011. The CIA Director nonetheless represented that the CIA detention and interrogation program was "fully briefed" to "every member of our Intelligence Committees," relaying to foreign government leaders that therefore the interrogation program was not a CIA program, but "America's program." Ultimately, the Committee and both the Senate and the House of Representatives rejected the CIA program in bipartisan legislation.

~~(TS/~~[redacted]~~NF)~~ We disagree with the *Study's* conclusion that the Agency actively impeded Congressional oversight of the CIA detention and interrogation program. We believe the record demonstrates that CIA leaders made a good faith effort to keep oversight committee leaders fully briefed on the program within the strict limits on access that had been set by the White House. Within these parameters, Agency records indicate a fairly consistent engagement with Congressional oversight in the period prior to the public acknowledgment of the program. As discussed in our response to Conclusion 9, we also disagree with the assessment that the information CIA provided on the effectiveness of the program was largely inaccurate. Finally, we have reviewed DCIA Hayden's testimony before SSCI on 12 April, 2007 and do not find, as the *Study* claims, that he misrepresented virtually all aspects of the program, although a few aspects were in error.

~~(TS/~~[redacted]~~NF)~~ CIA acknowledges that it did not share all available information concerning the program with all members of the Committees—especially prior to 6 September, 2006—but this was in keeping with the guidance provided by the White House. Under the National Security Act of 1947 as amended, Section 503(c) (2), the President sets the parameters for how much information on covert action programs is shared with the Congress; CIA does not determine such access. While all oversight committee members were informed of the existence of the program, the White House decided that information on the enhanced interrogation techniques would be restricted to the chairman and the ranking minority members of the oversight committees, along with up to two additional staffers on each committee. Within this framework, the records show an effort to keep congressional oversight informed of developments, as a few key examples indicate.

- ~~(TS/~~[redacted]~~NF)~~ In total, CIA briefed SSCI members or staff on rendition, detention, or interrogation issues more than 35 times from 2002-2008. CIA provided more than 30 similar briefings to HPSCI members or staff during the same time period and provided more than 20 notifications.

- ~~(TS/~~[redacted]~~NF)~~ CIA began using enhanced techniques while Congress was in its August 2002 recess. The first briefing of HPSCI leadership followed on 4 September while SSCI leaders received the same briefing on 27 September. Both briefings for leaders covered background on the authorities to use the techniques, the coordination which had taken place with DoJ and the White House, a description of the enhanced techniques which had been employed, and some discussion of the intelligence that had been acquired.

- ~~(TS/~~[redacted]~~NF)~~ CIA's Inspector General was informed of a case of a deviation from approved techniques and of the death of Gul Rahman on 21 and 22 January 2003 respectively. CIA briefed those incidents to DoJ on 24 January and underscored its intention to notify the new leadership of the oversight committees as part of a previously planned briefing on interrogation practices. These briefings took place on 4 and 5 February, and covered what had happened in both cases, what intelligence was being collected in the debriefings, a detailed discussion of enhanced techniques, and CIA's intention to destroy tapes of the interrogation sessions.

- ~~(TS/~~[redacted]~~NF)~~ CIA's Inspector General initiated a review of CIA's counterterrorism detention and interrogation activities in January 2003. The review was completed in May 2004 and he and senior CIA officers briefed the results to the HPSCI and SSCI leadership on 13 and 15 July respectively. The HPSCI session lasted two hours and contemporaneous notes indicate it evolved into an in-depth discussion of the practical, political, legal, and moral issues involved. The Inspector General followed up with separate briefings for the SSCI leadership in early March 2005 on the cases and projects pending in his office.

- ~~(TS/~~[redacted]~~NF)~~ The leadership of both oversight committees were briefed in March 2005. The topics ranged from the legal justifications for enhanced techniques, internal controls and safeguards, the approach that was taken to employing the techniques, and interrogation results.

(U~~//FOUO)~~ We disagree with the *Study's* contention that limiting access is tantamount to impeding Congressional oversight. The *Study* cites a number of examples to bolster its contention; these involve points of process, refusal to provide documents, and selective provision of information to shape legal opinions. We assess all contain inaccuracies.

- (U~~//FOUO)~~ Conclusion 13 does not reflect mutually agreed upon past or current practices for handling restricted access programs. Indeed, the Committee codified, as part of the FY12 Intelligence Authorization Act, the practice of briefing sensitive matters to just the Chairman and Ranking Member, along with notice to the rest of the Committee that their leadership has received such a briefing.

- (U~~//FOUO)~~ We also disagree with the *Study's* contention that not "reading-in" additional Committee staffers in the post-2006 period equates to actively impeding oversight. Restricting staff access was consistent with current and long-standing practice as regards sensitive covert action programs.

- (U/~~/FOUO~~) The *Study's* statement that CIA denied Members' requests for a copy of the OLC Memoranda is incorrect. CIA did not have the authority to provide those memoranda to the Committee. The President and the Attorney General determine whether to grant direct access. In lieu of providing the memoranda, however, Acting Assistant Attorney General Bradbury testified and provided information about the OLC memoranda.

~~(TS/~~[redacted]~~/NF)~~ Finally, we disagree with the *Study's* claim that DCIA Hayden's testimony before SSCI on 12 April 2007 misrepresented virtually all aspects of the program. The testimony contained some inaccuracies, and the Agency should have done better in preparing the Director, particularly concerning events that occurred prior to his tenure. However, there is no evidence that there was any intent on the part of the Agency or Director Hayden to misrepresent material facts. DCIA Hayden sought in the statements made during this session to discuss the history of the program, the safeguards that had been built into it, and the way ahead.

- (U~~//FOUO~~) Consistent with our response to Conclusion 9, we maintain that his characterization of the intelligence derived from the program as having helped the US disrupt plots, save lives, capture terrorists and, as a supplementary benefit, better understand the enemy, was correct.

- ~~(TS/~~[redacted]~~NF)~~ In his statement for the record, DCIA Hayden noted as an example of a safeguard CIA had built into the program that all those involved in the questioning of detainees are carefully selected and trained. We concede that prior to promulgation of DCIA guidance on interrogation in January 2003 and the establishment of interrogator training courses in November of the same year, not every CIA employee who debriefed detainees had been thoroughly screened or had received formal training. After that time, however—the period with which DCIA Hayden, who came to the Agency in 2005, was most familiar—the statement is accurate.

- ~~(TS/~~[redacted]~~NF)~~ DCIA Hayden stated that "punches" and "kicks" were not authorized techniques and had never been employed and that CIA officers never threatened a detainee or his family. Part of that assertion was an error. The DCIA would have been better served if the Agency had framed a response for him that discussed CIA's policy prohibiting such conduct, and how the Agency moved to address unsanctioned behavior which had occurred (including punches and kicks) and implement clear guidelines. He could have also reported that CIA's Inspector General investigated these incidents and recommended reviews of the employees' conduct as warranted. Several employees were removed from the program for the use of unsanctioned techniques.

- (~~TS//~~[redacted]~~NF~~) Director Hayden also expressed his view that CIA would not have been able to obtain the intelligence it did from 30 detainees who underwent enhanced interrogation techniques if the Agency had been restricted to the Army Field Manual alone. CIA's current view, as described elsewhere in our response, is that it is inherently unknowable whether the Agency could have acquired the same information without the use of enhanced techniques. That does not, however, suggest that Director Hayden sought to mislead when he expressed his opinion.

- ~~(TS/~~[redacted]~~NF)~~ We acknowledge that the location of the "blacksites" was withheld from the full Committee. As DCIA Hayden and others made clear, however, CIA was not authorized to share that information.

- ~~(S//NF//OC)~~ We disagree with the *Study's* claim that DCIA Hayden misled Congress on the videotapes. As noted above, CIA officials in January 2003 notified the leadership of both Congressional oversight committees of the existence of tapes of interrogations and of CIA's intent to destroy them. We acknowledge that DCIA did not volunteer past information on CIA's process of videotaping the interrogation sessions or of the destruction of the tapes, but note that by the time hearing took place, HPSCI and SSCI leaders had been notified of the tapes' destruction and had access to the 2004 CIA IG report that spoke in detail concerning the tapes' existence.

~~(C//OC/NF)~~ Conclusion 14: The CIA's Office of Public Affairs and senior CIA leadership coordinated to share classified information on the CIA detention and interrogation program to select members of the media to counter public criticism and avoid potential Congressional action to restrict the CIA's detention and interrogation authorities and budget. Much of the information the CIA provided to the media on the operation and effectiveness of the CIA detention and interrogation program was inaccurate. It was the policy of the CIA not to submit crimes reports on potential disclosures of classified information to the media when the CIA's Office of Public Affairs and the CIA leadership had sanctioned the cooperation with the media.

~~(C//OC/NF)~~ CIA did occasionally engage with the media on the RDI program, but the *Study* is wrong in asserting that it did so for the purpose of avoiding oversight or that there was a coordinated, systemic public relations campaign to garner support for the program. The Office of Public Affairs' (OPA) records from this period are fragmentary, but the documents that are available, as well as the recollections of those working in OPA at the time, indicate that the vast majority of CIA's engagement with the media on the program was the result of queries from reporters seeking Agency comment on information they had obtained *elsewhere*. As a result, the primary purpose of these interactions—as with many of our interaction with the media--was to persuade reporters to safeguard as much sensitive intelligence as possible and to minimize inaccuracies that might reflect badly on the US Government.

~~(C//OC/NF)~~ The Agency makes decisions to engage with journalists on press stories or book projects on a case-by-case basis after a review of the risks and potential benefits to the US Government, including the opportunities to mitigate or limit the disclosure of classified information. In general, when reporters come to OPA with stories on classified programs and sources and methods, Director OPA (D/OPA) will consult with CIA leadership and those components whose operational equities are at stake.

- ~~(C//OC/NF)~~ When faced with a reporter who already has classified information in hand, there are a number of potential options, including asking the reporter to hold the story or remove specific information, which sometimes has the effect of providing an off-the-record acknowledgement of the sensitive information; steering the reporter away from incorrect information that impinges on sources and methods without confirming any other information; providing a balanced perspective via a broad overview that does not provide additional detail; and declining to comment.

~~(C//OC/NF)~~ During this period, CIA's interaction with the media involved examples that fell into each of these categories. The Agency consistently tried to protect classified programs and, if necessary, provide context that would allow the program to be put into context. As is always the case, the reporters and their management ultimately decided what information to publish.

~~(C//OC/NF)~~ The supporting text to Conclusion 14 focuses on a single interaction between the CIA and the media in 2005, as evidence of a CIA plan to make unauthorized releases of classified information in order to increase public support for the program and blunt any Congressional opposition to program activities that could arise. The *Study's* account of this interaction omits key facts. We acknowledge that some CIA officers, including then-Director Porter Goss, met with Tom Brokaw of NBC news in April, 2005. Although Agency records from the period are incomplete, the documentary record we do have as well as our conversations with former officers strongly indicate that it was NBC that initiated contact with the Agency, requesting information as part of a one-hour documentary to be hosted by Mr. Brokaw on the global war on terrorism.

- ~~(C//OC/NF)~~ The record shows a careful effort to create talking points for both the Director and the Deputy Director of CTC that referenced previously disclosed or reported material, with citations for each item to public sources such as the 9-11 Commission Report, court documents, and periodicals. We found no materials showing discussions about making first-time, classified disclosures.

- ~~(C//OC/NF)~~ The *Study* cites a portion of an electronic "chat" between the Deputy Director of CTC and another officer, construing it as evidence that the Agency intended to provide classified information to NBC in an effort to "sell" the program publically. As a threshold matter, the informal comments of any one CIA officer do not constitute Agency policy with regard to media interactions. More importantly, a review of the complete chat transcript and contemporaneous emails that were made available to the Committee shows that the officers were discussing the talking points mentioned above, which describe previously disclosed information relating to the program.

- (U) A review of the NBC broadcast, cited by the *Study*, shows that it contained no public disclosures of classified CIA information; indeed, *the RDI program was not discussed*.

~~(C//OC/NF)~~ We also disagree with the Study's allegation that the information that we provided to the public regarding the value of the intelligence derived from the program was inaccurate. Our response to Conclusion 9 makes clear that CIA's representations, as reflected in President Bush's 2006 speech, were, with one exception, accurate.

~~(C//OC/NF)~~ Conclusion 14 is incomplete with regard to its discussion of CIA policy on unauthorized disclosures. With regard to intelligence activities, Agency regulations empower the Director of Public Affairs, with the approval of one of the Agency's top three leaders (DCIA, DDCIA, and EXDIR), to authorize the disclosure of information to the media. With regard to information related to covert action, authorization rests with the White House. When such authorizations occur, there is self-evidently no need for a crimes report as the disclosure is fully in accord with the law.

- ~~(TS/~~[redacted]~~NF)~~ Records on the drafting of an unrealized public "rollout" of the RDI program, cited by the *Study*, are incomplete. But any such rollout would have been, by definition, an authorized disclosure implemented at the direction of and in concert with the White House, which owns all covert action programs. It would be nonsensical to file a crimes report on this or similar properly authorized disclosures.

~~(S//OC/NF)~~ Conclusion 15: The CIA's management and operation of the detention and interrogation program was deeply flawed. Despite the importance and significance of the authorities granted to the CIA to detain individuals outside of established law enforcement or military structures, the CIA did not keep accurate records on those it detained, placed individuals with no experience or training in senior detention and interrogation roles, and had inadequate linguistic and analytical support to conduct effective questioning of CIA detainees. The CIA also selected personnel to carry out sensitive detention and interrogation activities who had documented personal and professional problems which called into question the suitability of their participation in a sensitive CIA program, as well as their employment with the CIA and eligibility for access to classified information.

~~(TS/~~[redacted]~~NF)~~ We agree that the Agency made serious missteps in the management and operation of the program in its early days, as we discuss in Conclusion 1. However, by focusing almost exclusively on CIA's early efforts in [redacted] and at [redacted] we believe the *Study* significantly overstates CIA's shortcomings in managing the RDI program as a whole.

~~(TS/~~[redacted]~~NF)~~ As noted in our response to Conclusion 1, on September 12, 2001, CIA was unprepared to take on the operation of a worldwide detention program. It lacked key resources and expertise—particularly language-trained officers and personnel knowledgeable about detention facility management or interrogation. As CIA surged officers to the field in [redacted] the Agency's natural inclination was to focus on operations, analysis, and plot disruption. But even allowing for this mission-focused predisposition and the inherent difficulties [redacted] CIA failed to focus sufficient attention on creating standard operating procedures to manage detention facilities, provide officers in the field the resources they needed, or begin to keep adequate records until early 2003. As a direct consequence of these failings, CIA's operation of [redacted] was marred by serious flaws.

- ~~(TS/~~[redacted]~~NF)~~ In the earliest days of the program, CIA officers were unsure which CIA component was responsible for managing the [redacted] facility, [redacted] Multiple components at Headquarters monitored the facility, but no one actively "owned" it. There is no justification for this confusion, and its existence represents a failure of management. CIA leadership should have made clear from the outset which component and chain of command bore unambiguous responsibility for [redacted] and its detainees.

- ~~(S//OC/NF)~~ As the IG previously noted in its 2004 Special Review of the program, Headquarters officials did not act swiftly to respond to the field's concerns about inadequate staffing levels. As a result of staffing shortfalls, during the early months of [redacted] some detainees were not being questioned because the Agency lacked a sufficient number of debriefers in country. Moreover, CIA asked some officers to take on responsibilities for which they were neither prepared nor trained.

- ~~(S//OC/NF)~~ As a result of these severe shortfalls, a junior, "first tour" officer in [redacted] was asked to assume responsibilities for detainee interrogations only weeks after his arrival there. As the *Study* and two IG reports observed, that officer was later involved in the death of detainee Gul Rahman at [redacted] Delegating management of the [redacted] facility and detainee affairs in [redacted] to a first tour officer was not a prudent managerial decision given the risks inherent in the program. The Agency could have and should have brought in a more experienced officer to assume these responsibilities. The death of Rahman, under conditions that could have been remediated by Agency officers, is a lasting mark on the Agency's record.

~~(S//OC/NF)~~ While we acknowledge these shortcomings, the *Study* fails to take note of significant improvements implemented at [redacted] following Rahman's death, as well as the far more stringent standards governing interrogations and safety applied at later detention sites. Headquarters established CTC's Renditions and Detentions Group CTC/RDG as the responsible entity for all CIA detention and interrogation sites in December 2002, removing any latent institutional confusion. CTC/RDG sent its first team to [redacted] to debrief and interrogate detainees that same month, and the team immediately established procedures for requesting approval for enhanced techniques. These procedures were further institutionalized following promulgation of the DCI's Detention and Interrogation Guidelines in January 2003. With the exception of water dousing and the use of a wooden dowel behind the knees of a detainee employed by the lead HVT interrogator (who was removed from the program as a consequence of employing the latter in July 2003), these adjustments eliminated the use of improvised techniques, which were criticized extensively in the 2004 IG's *Special Review* and in its investigation report on Gul Rahman's death, as they are in the *Study*.

- ~~(TS/~~[redacted]~~NF)~~ There were inherent limitations on Agency efforts to upgrade [redacted] Its location [redacted] made it difficult to implement facilities upgrades to bring it more in line with sites like [redacted] The program continued to face challenges in identifying sufficient, qualified staff—particularly language-qualified personnel—as requirements imposed by Agency involvement in Iraq increased. However, the first Quarterly Review of Confinement Conditions mandated by the 31 January 03 DCIA Guidelines on the Conditions of Confinement, produced in April 2003, cited significant improvements at [redacted] including space heaters, sanitation and hygiene enhancements, as well as better nutrition for the detainee population.

~~(S//OC/NF)~~ Indeed, from January 2003 through 2005 the program as a whole continuously improved. Certification of officers involved in interrogations continued; procedures and confinement conditions continued to be refined and upgraded. This is reflected in the CIA IG's 2005 audit of the program, which concluded that the overall program for operating detention and interrogation facilities was effective and that standards, guidelines, and recordkeeping were generally sufficient. As occasional errors occurred over the remaining life of the program, they were reviewed by supervisors and IG investigations, and sometimes resulted in accountability boards or, in appropriate cases, referrals to the Department of Justice.

~~(TS/~~[redacted]~~NF)~~ In [redacted] was eventually closed in accord with planning begun in [redacted] and necessitated by the site's inherent limitations with respect to operational security. [redacted] CIA decided that the risks of operating [redacted] outweighed the benefits of having a place to intern detainees who could no longer be housed in [redacted]

[redacted] The decision to close [redacted] reflected a maturation of CIA's approach to risk management in the program and better prioritization of longer term detention challenges.

~~(S//OC/NF)~~ The *Study* omits important additional facts and context relating to its critique of Agency recordkeeping and the selection of officers with questionable professional and personal track records to perform interrogations and other sensitive program tasks.

~~(S//OC/NF)~~ First, the decline in reporting over time on the use of enhanced techniques, which the *Study* characterizes as poor or deceptive recordkeeping, actually reflects the maturation of the program. In early 2003, a process was put in place whereby interrogators requested permission in advance for interrogation plans. The use of these plans for each detainee obviated the need for reporting in extensive detail on the use of specific techniques, unless there were deviations from the approved plan. Moreover, the use of certain techniques declined over time; the list of approved techniques dropped from a high of 13 in 2004 to six in 2007. The waterboard was not used after March 2003.

~~(S//OC/NF)~~ Second, the *Study* implies that Agency managers knowingly sent [redacted] individuals to the field, highlighting [redacted] officers with problematic service or personal histories. Overall, more than [redacted] officers were part of this program over its life. The vast majority were solid performers and were well trained. [redacted] some of the [redacted] officers mentioned in the *Study*—[redacted] should have been excluded—much of the derogatory information was not in fact available to senior managers making assignments [redacted]

~~(S//OC/NF)~~ For example, the junior officer assigned to oversee [redacted] was not placed in his position by a formal Headquarters assignment panel, but was given his responsibilities as a consequence of an on-the-scene decision by [redacted] COS [redacted] operating in a resource-constrained environment, [redacted]

- [redacted]

~~(S//OC/NF)~~ Conclusion 16: CIA officers and contractors involved in the CIA detention and interrogation program known to have violated CIA policy were rarely held accountable by the CIA, including those CIA officers who used unauthorized interrogation techniques against CIA detainees. Significant events, to include the death and injury of detainees and the detention of individuals who did not meet the legal standard to be held by the CIA, did not result in appropriate organizational lessons learned or effective corrective actions.

~~(S//OC/NF)~~ Our review of Conclusion 16 did indicate significant shortcomings in CIA's handling of accountability for problems in the conduct and management of CIA's RDI activities. However, the *Study* lays out two supporting arguments that are best assessed separately, because we agree—and have expanded on—the first, but the second appears unfounded.

- ~~(S//OC/NF)~~ The first argument is that in some important cases involving clearly evident misconduct, the CIA did not in the end sufficiently hold officers accountable even after full investigation and adjudication.[9] We largely concur, although we would take the *Study's* argument one step further. The *Study* focuses on the inadequate consequences meted out for line officers who acted contrary to policy in conducting interrogations in the field or in providing the rationale for captures from CTC. To us, an even more compelling concern is that the Agency did not sufficiently broaden and elevate the focus of its accountability efforts to include the more senior officers who were responsible for organizing, guiding, staffing, and supervising RDI activities, especially in the beginning.

- ~~(S//OC/NF)~~ The Conclusion's second supporting argument is that there were many more instances of improper actions for which some form of accountability exercise should have been conducted but was not. We found problems with the factual basis for this argument.

~~(S//OC/NF)~~ **Accountability Outcomes.** CIA's RDI activities engendered a significant number of accountability-related actions. The IG, often in response to CIA referrals, conducted at least 29 investigations of RDI-related conduct, plus two wide-ranging reviews of the program. Many cases were investigated by the IG and found to be without merit. Of the cases which were found to be supported by the facts, one involved the death of an Afghan national who was beaten by a contractor. The individual involved was prosecuted by the Department of Justice and convicted on a felony charge. Another case involved a contractor who slapped, kicked, and struck detainees when they were in military custody. Shortly after the IG concluded its investigation of that case, the contractor was terminated from the CIA, had his security clearances revoked, and was placed on a contractor watchlist.

~~(S//OC/NF)~~ In addition to IG investigations and criminal prosecutions—including an omnibus three-year investigation of all RDI activity by a DoJ special prosecutor, which involved the review of more than 100 detainee cases, involving those in both Agency and DoD custody—CIA convened six accountability proceedings, either at the directorate or higher level, from 2003 to

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[9] The *Study's* main boldface conclusion states that those known to have violated policy were "*rarely* held accountable," but the first line of the discussion that follows states categorically that CIA "*did not* hold individuals accountable for abuses in the CIA detention and interrogation program" (emphasis added). For purposes of our response, and in light of the substantial documentation demonstrating the existence of numerous accountability exercises, we will assume that the authors intended to allege that we only "rarely" held officers accountable.

2012. These reviews assessed the performance of 30 individuals (staff officers and contractors), and 16 were deemed accountable and sanctioned. [10]

~~(S//OC/NF)~~ Although considerable attention was paid to cases of wrongdoing, we acknowledge that, particularly in the cases cited in the *Study's* Conclusion, the narrow scope of CIA's accountability efforts yielded outcomes that are, in retrospect, unsatisfying in view of the serious nature of the events. Most egregiously, we believe that CIA leaders erred in not holding anyone formally accountable for the actions and failure of management related to the death of **Gul Rahman** at [redacted] in 2002. We understand the reasoning underlying CIA management's decision to overturn an accountability board recommendation that would have imposed sanctions on the least experienced officer involved. The most junior in the chain of command should not have to bear the full weight of accountability when larger, systemic problems exist and when they are thrust into difficult battlefield situations by their supervisors and given a risky and difficult task and little preparation or guidance. Still, it is hard to accept that a CIA officer does not bear at least some responsibility for his or her actions, even under trying circumstances.

- ~~(S//OC/NF)~~ Moreover, deciding to minimize the punishment for a junior officer should not have been the end of the matter. CIA had an affirmative obligation to look more deeply into the leadership decisions that helped shape the environment in which the junior officer was required to operate, to examine what could have been done better, and to determine what responsibility, if any, should be fixed at a more senior level.

~~(TS/~~[redacted]~~NF)~~ In the case of **Khalid al-Masri** , our view of the accountability exercise is more mixed. As discussed in our response to Conclusion 18, the Agency applied the wrong interpretation of the MoN standard and plainly took too long to remediate its mistake. In that instance, an accountability review was undertaken and then-DCIA Hayden took significant steps to improve Agency practices in the wake of the error, directing that the Acting General Counsel review the legal guidance provided to CTC regarding renditions. The Director further called for a zero-based review of the operations officers and managers who were required to make analytic targeting judgments to determine the appropriate level of formal analytic training these officers needed to be effective in discharging their duties. That review was done, and it resulted in improved training for officers engaged in targeting work.

- ~~(S//OC/NF)~~ Nonetheless, we concede that it is difficult in hindsight to understand how the Agency could make such a mistake, take too long to correct it, determine that a flawed legal interpretation contributed, and in the end only hold accountable three CTC attorneys, two of whom received only an oral admonition.

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[10] In the RDI-related reviews, some of the officers assessed as accountable received disciplinary actions including one and two year prohibitions on promotion or any form of monetary recognition. Disciplinary actions at the level of Letters of Reprimand or above are permanently maintained in the security files of the disciplined officers. Other officers received oral admonitions and letters of warning; these individuals were those with a lesser degree of involvement in the matters under review. Some of the officers assessed as accountable were either not recommended for disciplinary action or recommended for lesser disciplinary actions, due to mitigating factors that included whether these officers had been provided appropriate guidance from CIA Headquarters; had sought, but not received, adequate guidance; or were not found to have acted with malice.

~~(S//OC/NF)~~ Accountability was more robust with regard to the incident in which an officer sought to frighten **Abd al-Rahim al-Nashiri** by threatening him with an unloaded handgun and a powerdrill. The senior officer present, who authorized use of the gun and drill as fear-inducers, retired [redacted] and was therefore beyond the reach of meaningful discipline. The subordinate officer involved, who had exhibited poor judgment but had obtained his supervisor's permission, received a letter of reprimand, was blocked from receiving pay increases or promotions for two years, suspended without pay for a week, and removed from the program.

- ~~(S//OC/NF)~~ However, we found no indication that the accountability process looked beyond the specific actions of these two officers to determine accountability for any management shortcomings related to such issues as the suitability of the officers involved or the paucity of guidance—the incident occurred prior to dissemination of DCI's formal guidance on interrogation techniques—under which they were operating.

~~(S//OC/NF)~~ Although we do not believe it would be practical or productive to revisit any RDI-related case so long after the events unfolded, looking forward the Agency should ensure that leaders who run accountability exercises do not limit their sights to the perpetrators of the specific wrongful action, but look more broadly at management responsibility and look more consistently at any systemic issues. At a minimum, no board should cite a broader issue as a mitigating factor in its accountability decision on an individual without addressing that issue head on, provided it remains practical to do so.

- (U~~//FOUO~~) In that regard we must note that such boards are sometimes encumbered by the excessive length of time that can lapse between the offending action and the convening of the board. Boards begun years after an event struggle just to sort out the basic facts, and they are not well positioned to expand the scope of inquiry or remedy management issues long in the past. Unfortunately, this problem can defy ready solution, because when it occurs, a contributing factor may be the time required for the DoJ to investigate and decide whether to prosecute any offenses.

~~(S//OC/NF)~~ Although we judge that the outcomes of these accountability exercises were inadequate, at least in scope, the record does show that, contrary to the claim in Conclusion 16, CIA often learned much from its mistakes and took corrective action. As we have discussed in responses to various *Study* conclusions, Gul Rahman's death catalyzed significant improvements in the organization, management, and conduct of the program. CIA made other significant adjustments in response to various internal and external reviews and investigations. For example, in response to the 2004 IG *Special Review*, CIA further refined its detention and interrogation guidelines; made improvements in CTC detainee record keeping; reviewed staffing plans for RDI facilities; issued additional Headquarters instructions to Chiefs of Station on their RDI responsibilities; worked to further ensure the timely dissemination of intelligence collected from detainees; and reviewed options available for eventual disposition of CIA detainees. The documentary record shows clearly that CIA took the recommendations seriously and that senior CIA leadership directed, and monitored, remedial actions as they were implemented.

(U~~//FOUO~~) **Alleged Additional Offenses.** As noted above, we were not persuaded by the *Study's* argument that there were multiple accountable offenses that CIA ignored. For instance, the *Study* alleges that 16 detainees were subjected to enhanced techniques without written authorization, and that officers participated in the use of enhanced techniques with at least eight detainees without having received approval to do so. As discussed in our response to Conclusion 20, the *Study* is wrong on both counts and falls short in its attempt to make the case that greater accountability was warranted. No more than seven detainees received enhanced techniques prior to written Headquarters approval; the *Study* miscounts because it confuses the use of standard techniques that did not require prior approval at the time they were administered with enhanced techniques that did.

- ~~(S//OC/NF)~~ One of the seven was Gul Rahman; in the other cases no accountability review was warranted because of a variety of mitigating factors, such as the fact that the unauthorized techniques in question did not differ greatly from those which Headquarters had already approved, Headquarters approved use of the techniques shortly after their use, or the existence of evidence indicating that there was no intent to mislead Headquarters or to substantively alter the approved interrogation plans.

- ~~(S//OC/NF)~~ With regard to the participation of insufficiently trained interrogators, in reaching its total the *Study* ignores the fact that interrogators were required, as a predicate to receiving certification, to participate in the application of enhanced techniques under the supervision of an already-certified instructor. As a result, an accountability review would have been inappropriate.

~~(TS/~~[redacted]~~NF)~~ Similarly, the *Study* claims that 26 individuals were detained even though they did not meet the requisite MoN standard. As our response to Conclusion 18 makes clear, the precise number, while the subject of much debate, was far fewer. The *Study's* count rests on a lack of appreciation for the evolving nature of intelligence and the real-world realities of the battlefield.

- ~~(TS/~~[redacted]~~NF)~~ The fact that the intelligence case for detaining an individual is later shown to be less powerful than originally thought does not, in itself, render the original reasonably well-founded decision to detain "wrongful," and therefore deserving of accountability review. Most notably, we observe that in decisions to detain within the context [redacted] which represent a large percentage of the 26 cases cited by the *Study*— evidence indicates the MoN standard was in fact met. The decisions were prompted by a reasonable belief that an individual was "planning terrorist activities" or represented a "serious threat of violence or death to U.S persons." When it subsequently learned that a given detainee did not, in fact, meet this standard, CIA's general course of action was to remedy the error, release the detainee, and provide cash payments for lost wages and inconvenience.

~~(S//OC/NF)~~ Conclusion 17: The CIA improperly used two private contractors with no relevant experience to develop, operate, and assess the CIA detention and interrogation program. In 2005, the contractors formed a company specifically for the purpose of expanding their detention and interrogation work with the CIA. Shortly thereafter, virtually all aspects of the CIA's detention and interrogation program were outsourced to the company. By 2006, the value of the base contract with the company with all options exercised was in excess of $180 million. In 2007, the CIA signed a multi-year indemnification agreement protecting the company and its employees from legal liability.

(U~~//FOUO)~~ We agree that CIA should have done more from the outset to ensure there was no conflict of interest—either apparent or actual—in the role performed by the contractors selected to assist with the program. However, we disagree that the contractors lacked important and relevant experience, that we "outsourced" or somehow lost governmental control over the program, or that the Agency erred in entering into a relatively commonplace indemnification agreement with the contractors' company.

~~(TS/~~[redacted]~~NF)~~ Over the course of the detention and interrogation effort, the roles performed by [redacted] included interrogations, assessment of detainees' psychological fitness for interrogation, as well as assessment of the effectiveness of particular interrogation techniques, among other responsibilities. They performed these functions as part of an interrogation team in which decision-making authority rested with a CIA staff officer. As the *Study* correctly points out, the propriety of the wide-ranging nature of the psychologists' roles—particularly their involvement in 1) performing interrogations, 2) assessing the detainees' psychological fitness, and 3) assessing the techniques' effectiveness—raised concerns and prompted considerable discussion and deliberation within CIA.

- ~~(S//OC/NF)~~ As a result of these internal deliberations and reviews relating to the propriety of permitting one individual to play the dual role of psychologist and interrogator, CIA management promulgated guidance on the scope of the contractor psychologists' involvement in individual interrogations. On 30 January 2003, CIA Headquarters affirmed that CIA policy was to ensure that no contractor could issue the psychological assessment of record and that the staff psychologist responsible for this assessment could not be serving in a role which included the application of interrogation techniques on the same detainee nor focus their support on assisting the interrogators for the purpose of the interrogation instead of the detainee's psychological health.[11]

- ~~(TS/~~[redacted]~~NF)~~ In practice, by April 2003, staff psychologists had taken over almost all of the provision of support to the RDI program. As it concerned [redacted] however, the appearance of impropriety continued, albeit to a lesser degree, because they were occasionally asked to provide input to assessments on detainees whom they had not interrogated. CIA's policy on this score changed in May 2004, limiting them to an interrogation role only.

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[11] DIRECTOR [redacted]

- ~~(S//OC/NF)~~ We acknowledge that the Agency erred in permitting the contractors to assess the effectiveness of enhanced techniques. They should not have been considered for such a role given their financial interest in continued contracts from CIA.

~~(TS/~~[redacted]~~NF)~~ Conclusion 17 is incorrect, however, in asserting that the contractors selected had no relevant experience. As the *Study* notes elsewhere, [redacted] had [redacted] years of experience, respectively, with the US Air Force's Survival Evasion Resistance and Escape (SERE) training program, where each of them had served as [redacted] In addition, [redacted] had conducted academic research and written a number of research papers on such topics as resistance training, captivity familiarization, and learned helplessness—all of which were relevant to the development of the program. [redacted] had the closest proximate expertise CIA sought at the beginning of the program, specifically in the area of *non-standard means of interrogation.* Experts on traditional interrogation methods did not meet this requirement. Non-standard interrogation methodologies were not an area of expertise of CIA officers or of the US Government generally. We believe their expertise was so unique that we would have been derelict had we not sought them out when it became clear that CIA would be heading into the uncharted territory of the program.

~~(TS/~~[redacted]~~NF)~~ Conclusion 17's assertion that we "outsourced" the program is likewise flawed. Although the company that the two psychologists formed, [redacted] did take on a fairly comprehensive set of responsibilities, including interrogation services, security teams for facilities, and training, all of that work was closely managed by CIA staff officers pursuant to policy guidelines and oversight from Headquarters managers. Their role also served as tacit acknowledgement that interrogating detainees and managing internment facilities would not be a long-term CIA core mission.

- ~~(TS/~~[redacted]~~NF)~~ The *Study's* citation of the value of [redacted] contract is requires clarification. Although the value of the contract would have been in excess of $180 million if all options had been exercised, in fact the firm was actually paid about $81 million by the time the contract was terminated in 2009.

~~(TS/~~[redacted]~~NF)~~ The *Study* implies that there was something unusual and nefarious in CIA's indemnification of [redacted] which protected the company and its employees from legal liability arising out of their work on the RDI program. In fact, the need and value of indemnification provisions for private corporations that assist the Government in achieving its national security priorities are widely recognized, including in the Detainee Treatment Act and the FISA Amendments Act. Without such agreements, it would be difficult and ultimately more expensive to find quality firms willing to take on difficult tasks that bear greater than usual legal risk.

- ~~(TS/~~[redacted]~~NF)~~ The terms of the indemnification agreement with [redacted] ensured that it was in the Government's best interest. The agreement set a overall monetary cap, and excluded indemnification for gross negligence or intentional misconduct, lost profits, damages to reputation, or any legal fees or fines resulting from a final adjudication of guilt of any criminal offense in any US federal or state court.

~~(TS/~~[redacted]~~NF)~~ Finally, the *Study* notes that CIA employees were lured away to work for [redacted] That is true, but this phenomenon was not unique to that firm. Government wide, the surge in capacity needed to fight the war on terrorism was heavily dependent on the services of a variety of contractors, which created a strong demand for cleared personnel and, for too many of our employees, an irresistible financial lure. Indeed, the resulting loss of talent and the morale problems created when employees saw colleagues resign one day and return the next at higher pay became sufficiently acute that in 2007 CIA issued regulations that imposed an 18-month waiting period on CIA employees returning as contractors if they resigned but did not retire.

~~(S//OC/NF)~~ Conclusion 18: The CIA consistently represented in classified settings and to the public that the CIA had detained fewer than 100 individuals. This information was inaccurate. A review of CIA records found that the CIA detained at least 119 individuals, including at least 26 individuals who did not meet the requirements for CIA detention. Those detained inappropriately included individuals deemed innocent of any wrongdoing, including an "intellectually challenged" man whose detention was used solely as leverage against his brother, individuals who were intelligence sources, and individuals whom the CIA assessed to be connected to al-Qaida solely due to information fabricated by a CIA detainee being subjected to the CIA's enhanced interrogation techniques.

~~(TS//~~[redacted]~~/NF)~~ CIA agrees that it should have been able to provide, and the Committee had reason to expect, better record keeping with regard to the number of individuals detained under CIA's authorities in paragraph 4 of the 2001 MoN. Moreover, CIA acknowledges that it detained at least six individuals who failed to meet the proper standard for detention, and waited too long, in too many cases, to release detainees when we determined they did not meet that standard. However, we believe the *Study* applies too much hindsight in reaching its conclusion that 26 individuals were wrongly detained, ignoring key facts that, at the time, drove rational CIA decision-making.

~~(S//OC/NF)~~ Over the life of the program, CIA had difficulty accurately articulating how many individuals were in the program, largely due to two factors:

- ~~(TS//~~[redacted]~~NF)~~ *Evolving standards for counting detainees and defining what it meant to be an RDI program detainee.* Throughout the program's history, CIA failed to promulgate sufficiently clear definitional standards for determining which detainees should be formally counted as falling within it. Through at least 2009, CIA generally utilized a definition of "RDI program" detainees as those held by CIA following the decision in December 2002 to consolidate formal control over all detention and interrogation activities under CTC/RDG. That meant that detainees who were housed at [redacted] prior to that date, for example, were not counted as part of "the program." That was so even where paragraph 4 of the MON was the basis for CIA's involvement in the detention.[12]

- ~~(TS//~~[redacted]~~NF)~~ *Poor record keeping relating to when MoN authorities were invoked and when detainees entered and left CIA custody.* Many of the appropriate records are either absent or inadequate, especially during the 2002-2003 period. In too many instances, CIA lacks documentation explaining the rationale for detention under the MoN or clear records showing detainee movements and dates of custody.

~~(S//OC/NF)~~ While the Agency should certainly have done much better in accounting for the total of detainees and in making representations as to their number, we do not agree with the *Study's* implication that our failure was intentional or that the discrepancy was substantively meaningful, in that it does not impact the previously known scale of the program. It remains true that approximately 100 detainees were part of the program; not 10 and not 200. The *Study* leaves unarticulated what impact the relatively small discrepancy might have had on policymakers or Congressional overseers.

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[12] ~~(S//OC/NF)~~ We address Director Hayden's decision to maintain that the number of CIA detainees was less than 100, despite emerging information to the contrary, in our response to Conclusion 8.

~~(TS/~~[redacted]~~NF)~~ With regard to "wrongfully detained" individuals, we acknowledge that there were cases in which errors were made. One important source of error was that the Agency's lawyers sometimes reached different conclusions about the correct legal standard for detention—a state of affairs that should never have been allowed to develop. This issue was examined in detail in the OIG Report of Investigation relating to the rendition and detention of Abu Khalid al-Masri. From the outset, CIA should have clearly defined the standard for placing a detainee in CIA custody and required a clear statement of that correct standard, as well as an outline of the supporting intelligence case, in cables which approved renditions and subsequent detentions. Instead, confusion about the correct legal standard occasionally prevailed.

- ~~(TS/~~[redacted]~~NF)~~ Some CIA officers believed that if a potential detainee had access to information about a high-value target the MoN standard was satisfied, while others focused (correctly) on the MoN language requiring a "continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities." OGC management should have worked closely to clarify the basic standard and regularly review its application.

- (~~TS/~~[redacted]~~NF)~~ A review that resulted from the accountability board charged with assessing the improper detention of al-Masri showed that other individuals detained under the incorrect MoN standard would, in fact, have met the correct standard had it been applied. Nevertheless, the al-Masri case remains a blemish on CIA's record of accurately interpreting and working within its counterterrorism authorities.

(~~TS/~~[redacted]~~NF)~~ We do not agree with the *Study's* assumption that every detainee who was ultimately released due to a change in our assessment of whether or not he met the MoN standard should be considered to have been "wrongfully" detained. Many detention decisions were reasonable under the MoN standard at the time they were made.

- ~~(TS/~~[redacted]~~NF)~~ For example, the *Study* highlights several cases in which CIA is alleged to have wrongfully detained individuals in [redacted] settings [redacted] Two such examples involve the "mentally challenged" brother of a Hezb-I Islami Gulbuddin (HIG) facilitator who were captured together along with explosives and communications gear, and a detainee who was captured by the U.S. Military for using a satellite phone and turned over to CIA. Another example not cited concerned a Saudi national who was detained on the spot [redacted] while he was videotaping [redacted] in a casing effort that he admitted was at the direction of a senior al-Qa'ida commander in the FATA.

- (~~TS/~~[redacted]~~NF)~~ The MoN standard allowed for persons who were planning terrorist attacks to be captured and detained, and given the context of the battlefield environment we believe detention was a reasonable approach in all of these cases. We also note that in the case of the "mentally challenged" brother, the detainee was removed from CIA custody in a matter of weeks after it had been conclusively determined that he did not have any knowledge of his brother's HIG activities. He was released by the U.S. military shortly thereafter.

~~(S//OC/NF)~~ Moreover, the *Study* highlights a number of cases, particularly in 2002 through late 2003—a period during which there were significant concerns about follow-on attacks against the homeland—where we acknowledge CIA occasionally accepted compelling sole-sourced intelligence cases for detaining individuals in an effort to be sure that all possible was being done to thwart attack planning. At the time, the national priority was preventing attacks.

- ~~(S//OC/NF)~~ For example, in March 2003 we assessed that Khalid Shaykh Muhammad (KSM) had moved to a more cooperative posture as his interrogation progressed. When he provided actionable information and what we assessed as well-sourced intelligence indicating that two individuals posed "continuing, serious threats to U.S. persons and interests," we took action to detain them. In the end, KSM admitted that he fabricated the derogatory information on these individuals, and they were released. But their detention can only be considered "wrongful" after the fact, not in the light of credible information available at the time and in a context in which plot disruption was deemed an urgent national priority.

~~(TS//~~[redacted]~~NF)~~ [redacted] Overall, we believe that continuing re-evaluations of detainees' status in light of new information are in fact indicative of a functioning "safety valve." The *Study* notes several cases in which detainees were released after new, exculpatory information came to light. In some cases, information that had led to the initial detention of certain individuals was later recanted; in others, forensic testing revealed incidents of mistaken identity or comprehensive debriefings led CIA to conclude that certain detainees did not meet the MoN standard.

- That said, the Agency frequently moved too slowly to release detainees. Of the 26 cases cited by the *Study*, we adjudicated only three cases in less than 31 days. Most took three to six months. CIA should have acted sooner.

~~(TS/~~[redacted]~~NF)~~ Conclusion 19: The interrogation of CIA detainees and the conditions of their confinement were more brutal than previously known. The CIA's enhanced interrogation techniques, as employed individually and in combination, diverged significantly from CIA representations to the Department of Justice. The waterboarding technique was physically severe, inducing convulsions and vomiting, with one detainee becoming "completely unresponsive, with bubbles rising through his full, open mouth." Later, internal CIA records detail how the waterboard evolved into a "series of near drownings." In addition, the use of the CIA's enhanced interrogation techniques continued against CIA detainees despite the detainees experiencing disturbing hallucinations and warnings from CIA medical personnel that the interrogation techniques could exacerbate injuries. The CIA doused and submerged detainees in ice-cold water. The conditions of confinement at CIA detention sites varied, but one CIA detention facility was described as a "dungeon," where CIA detainees were kept in complete darkness and constantly shackled in isolation cells with only a bucket to use for human waste. At times, the detainees were walked around naked and were shackled with their hands above their heads. A CIA detainee at one CIA detention site died of suspected hypothermia. At least four CIA detainees were subjected to rectal rehydration or feeding without medical cause. The technique was described by CIA personnel as effective in helping to "clear a person's head" and getting a detainee to talk.

~~(S//OC/NF)~~ We acknowledge that the *Study* has identified instances, discussed below, when CIA erred in applying individual techniques and agree that conditions at [redacted] particularly in its early days, were unacceptable and fell below those established at later detention sites. However, as we have noted in our response to several other conclusions, the *Study* consistently fails to distinguish between the early days at [redacted] and the rest of CIA's RDI efforts. Many of the *Study's* other examples and characterizations relating to allegedly "brutal" use of enhanced techniques lack clarifying detail or are incorrect. Most importantly, we found no evidence to support the charge that the facts relating to confinement conditions or the application of enhanced techniques were previously unknown or undisclosed to NSC and DOJ officials or to oversight committees.

- ~~(S//OC/NF)~~ The detention and interrogation regimen, including enhanced techniques and their expanded use after initial DOJ approvals in 2002, was briefed to NSC and DOJ officials and to oversight Committee leaders. The record shows that HPSCI and SSCI leaders, for example, were briefed on the program and enhanced techniques—including their expanded use—on 10 occasions between the Fall of 2002 and September 2003. In addition, most of the material contained in Conclusion 19 was investigated by the OIG and included in a *Special Review*, an audit, and several OIG Reports of Investigation published between 2004-2006, all of which were disseminated to oversight committee leaders and, in appropriate cases, referred to DOJ.

(U~~//FOUO~~) Nor does the record support the *Study's* claims with regard to the following enhanced technique-related issues:

~~(S//OC/NF)~~ **Hallucinations:** The *Study* alleges that the use of sleep deprivation exceeded the intended limits as represented to DOJ, resulting in a high incidence of hallucinations. In fact, hallucinations were rare in the RDI program, and when they occurred medical personnel intervened to ensure a detainee would be allowed a period of sleep. Medical literature overwhelmingly supported the conclusion that the adverse effects of acute sleep deprivation could be reversed with relatively short periods of rest or sleep. A review of the cases cited in the *Study* indicates that short periods of sleep effectively addressed the hallucinations and that the detainees were conscious of the fact that they had hallucinated.

~~(S//OC/NF)~~ **Water Dousing:** The *Study* asserts that CIA Headquarters provided no guidance on the use of water dousing until 2004. This is incorrect. In fact, CIA Headquarters provided guidance via cable traffic on water dousing as early as March 2003 and the technique was also part of OMS' draft guidelines dated September 2003. It was considered the most coercive of the standard techniques in use until early 2004, when allegations made by Mustafa al-Hawsawi were reported to OIG and investigated. At that time, given the risk that the technique could be misused, it was added to the list of enhanced techniques.

- ~~(S//OC/NF)~~ While it is reasonable to question the propriety of employing water dousing with cold water at the [redacted] facility at which Gul Rahman died, likely due to hypothermia, it is important to note that the technique was employed after the first few months at [redacted] in rooms heated to a minimum of 65 degrees in order to prevent possible harm.

~~(S//OC/NF)~~ **Rectal Rehydration:** The *Study* alleges that that CIA used rectal rehydration techniques for reasons other than medical necessity. The record clearly shows that CIA medical personnel on scene during enhanced technique interrogations carefully monitored detainees' hydration and food intake to ensure HVD's were physically fit and also to ensure they did not harm themselves. Dehydration was relatively easy to assess and was considered a very serious condition. Medical personnel who administered rectal rehydration did not do so as an interrogation technique or as a means to degrade a detainee but, instead, utilized the well-acknowledged medical technique to address pressing health issues. A single flippant, inappropriate comment by one CIA officer concerning the technique, quoted in *the Study*, is not evidence to the contrary.

- ~~(S//OC/NF)~~ The technique was deemed safer than using IV needles with noncompliant detainees and was considered more efficient than a naso-gastric tube.

- ~~(S//OC/NF)~~ With respect to Majid Khan, in contrast to the *Study's* account, our records indicate Khan removed his naso-gastric tube, which posed the risk of injury and other complications. Given this dangerous behavior, rectal rehydration was considered the most appropriate means of addressing the potential harm Khan might inflict on himself.

~~(S//OC/NF)~~ **Waterboard.** We acknowledge that the Agency's use of the waterboard—particularly as it was applied to KSM, who was adept at resisting the technique—deviated from representations originally made by CIA to OLC in 2002. CIA recognized this and, in 2003, sought to reaffirm the OLC guidance. As detailed in our response to Conclusions 12, the result was that DOJ reviewed the issue and affirmed that the deviations did "not contravene the principles" of the original OLC opinion.

- ~~(S//OC/NF)~~ Without commenting on the wisdom or propriety of the waterboard or any other technique, and while acknowledging that the accounts of waterboarding contained in the *Study* certainly depict the application of a harsh interrogation regimen, we believe it important the record be clear: CIA utilized the waterboard on only three detainees. The last waterboarding session occurred in March 2003.

(~~TS/~~[redacted]~~NF)~~ We agree with aspects of the *Study's* assertion that, in two instances, CIA used enhanced techniques which could have exacerbated injuries sustained by detainees during capture. As acknowledged in our response to Conclusion 20, techniques (walling and cramped confinement) that had not been previously approved by Headquarters were applied to two Libyan detainees who had foot injuries. In the cases involving those detainees, Abu Hazim and 'abd al-Karim, Headquarters ultimately approved the techniques the following month as components of revised interrogation plans. Agency officers erred by proceeding without Headquarters approval –and even after obtaining approvals, it strikes us as unwise to have placed Hazim in a position that necessitated weight-bearing on his one healthy leg.

- ~~(S//OC/NF)~~ That said, a review of the relevant cable traffic indicates that CIA medical personnel were on scene and worked with the interrogators and support personnel in a sustained effort directed at preventing these pre-existing injuries from worsening.

~~(S//OC/NF)~~ Finally, as discussed in several other responses to conclusions, we agree with the *Study's* assessment that confinement conditions at [redacted] were harsher than at other facilities and were deficient in significant respects for a few months prior to the death of Gul Rahman in late 2002. After his death, CIA took steps to consolidate responsibility for the facility at Headquarters and moved quickly to improve conditions. Although conditions at the facility remained sub-optimal throughout its existence, significant improvements at the site prompted two SSCI staff members who visited the facility in late 2003 to compare it favorably with military facilities at Bagram and Guantanamo Bay. In fact, one remarked that [redacted] was "a markedly cleaner, healthier, more humane and better administered facility." [redacted] was decommissioned in 2004 in favor of a newer facility which incorporated many of the lessons learned from managing the program in [redacted] as well as from RDI program facilities in other countries.

~~(S//OC/NF)~~ Conclusion 20: CIA personnel frequently used interrogation techniques that had not been reviewed by the Department of Justice or approved by CIA Headquarters. The CIA regularly subjected CIA detainees to nudity, abdominal slaps, dietary manipulation, and cold water dousing, prior to seeking advice from the Department of Justice on the legality of the techniques. At least 16 detainees were subjected to the CIA's enhanced interrogation techniques without authorization from CIA Headquarters. In at least eight detainee interrogations, CIA officers participated in the use of the CIA's enhanced interrogation techniques without the approval of CIA Headquarters.

~~(S//OC/NF)~~ We agree that there were instances in which CIA used inappropriate and unapproved interrogation techniques, particularly at the program's outset. Overall, however, we believe that the *Study* overstates the number of instances of unauthorized use of enhanced techniques as well as the number of non-certified individuals whom it alleges wrongfully participated in interrogations. The *Study* also overlooks the fact that, subsequent to CIA's efforts to organize and consolidate its detention and interrogation efforts into one Headquarters-managed program, the Agency worked to ensure that allegations of wrongdoing were reported to management, the Office of Inspector General, and/or the Department of Justice (DOJ), as appropriate.

- ~~(U//FOUO)~~ Moreover, while it would have been prudent to seek guidance from OLC on the complete range of techniques prior to their use, we disagree with any implication that, absent prior OLC review, the use of the "unapproved" techniques was unlawful or otherwise violated policy.

~~(S//OC/NF)~~ The *Study's* assertion that 16 detainees were subjected to enhanced techniques without authorization from CIA Headquarters seems founded on a misunderstanding of the facts. The *Study* arrives at this number largely by conflating *standard* interrogation techniques that did not require prior approval with *enhanced* interrogation techniques that did. Some of this confusion is understandable, as over time, the term "standard" techniques was eliminated and some techniques which were initially classified as "standard" eventually were reclassified as "enhanced."

~~(TS/~~[redacted]~~NF)~~ The *Study* correctly identifies seven instances in which detainees were subjected to individual techniques which were not approved in advance and included in their interrogation plans. In several of these, however, Headquarters had approved interrogation plans for the detainees utilizing other enhanced techniques. For instance, our review of contemporaneous cable traffic indicates that, at[redacted]Libyans Abu Hazim and 'abd al-Karim appear to have been subjected to walling without prior approval. Muhammad Umar 'Abd al-Rahman , also known as "Asadallah," and 'abd al-Karim appear to have been subjected to cramped confinement without prior Headquarters approval. [redacted]detainee Ramzi bin al-Shibh appears to have been subjected to the use of the facial hold technique without prior approval. In these cases, other previously approved enhanced techniques were also used.

- ~~(TS/~~[redacted]~~NF)~~ In the cases involving Abu Hazim and 'abd al-Karim, Headquarters approved the techniques the following month as components of revised interrogation plans. In the case of Ramzi bin al-Shibh, a cable exchange 18 days after he was subjected to the facial hold indicated Headquarters support for the use of the technique so long as necessary medical personnel were on scene.

~~(S//OC/NF)~~ However, nine of the *Study's* examples describe the application, not of enhanced techniques, but of techniques that were classified at the time as standard. The DCI Guidelines for the Conduct of Interrogation, issued in January 2003, explicitly required prior written approval in advance for use of enhanced techniques, but the guidelines did not require such approvals for the use of standard techniques. While sleep deprivation, nudity, bathing, water dousing, and dietary manipulation were later reclassified as enhanced techniques, they were defined as standard techniques not requiring prior approval at the time relevant to the examples cited in the *Study*. As a consequence, it is misleading to assert that either officers or CIA's management of the RDI program erred by failing to obtain prior written approvals.

~~(TS/~~[redacted]~~NF)~~ We also believe it is important to note that half of the 16 examples cited in the *Study* concern detainees who were held at [redacted] prior to 3 December 2002, before [redacted] formal transition to RDG supervision and subsequent imposition, in January 2003, of guidance on standardized program techniques and approval processes for detention and interrogation operations in [redacted] The 2004 OIG *Special Review* catalogued the use of unapproved and inappropriate techniques at [redacted] from September through December 2002, and we have acknowledged serious shortcomings at [redacted] in several of our responses to *Study* conclusions. However, after the standard was approved and communicated in January 2003, interrogation operations at [redacted] were generally in line with the guidance—with some isolated exceptions identified in the *Study* and described elsewhere in our response.

~~(S//OC/NF)~~ The *Study* also asserts that CIA officers employed water dousing even though CIA Headquarters offered no guidance on the technique until January 2004. That is incorrect. We identified several Headquarters cables dated as early as 2 March 2003 which contained clear instruction on conditions required in order to apply water dousing in a safe and sanctioned manner. Subsequent Headquarters-originated cables were also located dating to June 2003, which classified the application of the technique as a "standard" technique. In September 2003, draft OMS guidelines also discussed water dousing as a standard technique and provided guidance to OMS personnel on its safe application.

~~(S//OC/NF)~~ The *Study* further asserts that in "at least eight" interrogations, officers participated without approval of CIA Headquarters. We are unable to locate and identify within the *Study* all eight instances to which the underlying text of Conclusion 20 refers. We presume the allegation is intended to reference interrogations involving non-certified officers. In reaching this conclusion, the *Study* appears to rely upon information taken out of context and, in other cases, simply fails to provide supporting evidence.

- ~~(TS/~~[redacted]~~NF)~~ The *Study* alleges that "CIA Headquarters approved the use of the CIA's enhanced interrogation techniques against Ridha al-Najjar at a [redacted] despite the fact that the CIA officers applying the techniques had never been trained in the use of the CIA enhanced interrogation techniques." Specifically, the *Study* goes on to assert that the officer used "sleep deprivation, sound, and other techniques" with Ridha al-Najjar [redacted] As with the examples the *Study* cites above, these techniques were not defined at the time as enhanced interrogation techniques requiring prior approval. Further, the *Study* itself acknowledges that the officer in question attended the *first* iteration of interrogation training that was offered in November 2002.

- ~~(S//OC/NNF)~~ The *Study* asserts that a CIA officer who was not specifically approved to use interrogation techniques during the debriefing of a detainee in early 2003 "participated in multiple interrogations" in which enhanced interrogation techniques were used and in which a certified interrogator participated. However, the *Study* itself specifically notes that the "cables do not specify whether [the officer] performed any of the interrogation techniques." There was never any requirement that officers be certified in order to be merely *present* when interrogation techniques were used. The certification requirement applied only to those individuals employing the techniques without supervision. In fact, in order to become certified, officers were required to observe the use of interrogation techniques as well as to use them with a detainee under the supervision of a certified interrogator.

- ~~(S//OC/NF)~~ Similarly, the *Study* asserts that in May 2003, [redacted] trained and qualified CIA officers applied enhanced interrogation techniques to a detainee under the supervision of a certified interrogator but without prior CIA Headquarters approval. The facts are otherwise, as the interrogation plan from the field—which was approved by Headquarters—specifically noted that these [redacted] CIA officers would employ the techniques under the supervision of the certified interrogator.

~~(S//OC/NF)~~ Finally, the *Study* asserts that interrogation techniques used with Abu Zubaydah subsequent to the August, 2002 OLC Memorandum differed from those represented to OLC prior to the memorandum and that CIA did not notify DOJ regarding these differences. The Study also asserts that after the 2002 memorandum, CIA used four interrogation techniques not yet reviewed by OLC. While we disagree with any implication that, absent prior OLC review, the use of particular techniques was unlawful or otherwise violated policy, we assess that the risks of this program would have been better managed by limiting ourselves to techniques defined and reviewed in advance by OGC and OLC.

(U) **Examples of CIA Representations of the Value of Intelligence Acquired From Detainees**

Overview 2

1. *(U) The Dirty Bomb Plot/Tall Buildings Plots and/or the Capture/Arrest of Jose Padilla 4*
2. *(U) The Karachi Plots 6*
3. *(U) The Second Wave Plot 8*
4. *(~~S//NF~~) The UK Urban Targets Plot and/or the Capture/Arrest of Dhiren Barot, aka Issa al-Hindi 10*
5. *(U) The Capture/Identification/Arrest of Iyman Faris 13*
6. *(~~S//NF~~) The Capture/Identification/Arrest of Sajid Badat 15*
7. *(U) The Heathrow/Canary Wharf Plotting 17*
8. *(U) The Capture of Hambali 19*
9. *(U) The Identification of KSM as the Mastermind of the 11 September 2001 Attacks 20*
10. *(U) The Identification of KSM's "Mukhtar" Alias 22*
11. *(U) The Capture of Ramzi Bin al-Shibh 23*
12. *(U) The Capture of KSM 25*
13. *(U) The Capture of Majid Khan 26*
14. *(U) The Thwarting of the Camp Lemonier Plotting 27*
15. *(U) The Assertion that Detainee Information Helps Validate Sources 29*
16. *(U) Arrest and Identification of Uzhair and Saifullah Paracha 31*
17. *(U) Critical Intelligence Alerting the CIA to Ja'far al-Tayyar 33*
18. *(~~S///NF~~) The Identification and Arrest of Salih al-Marri 35*
19. *(~~S//NF~~) The Collection of Critical Tactical Intelligence on Shkai, Pakistan 36*
20. *(U) Information on the Courier that Led to the UBL Operation 38*

Classified By: [redacted]
Derived From: [redacted]
Reason: 1.4(c)
Declassify On: 50X1-HUM

Overview

(U~~//FOUO~~) As discussed in our response to Conclusion 9 (see Tab B), we conducted a careful review of the *Study's* 20 examples of the value of the information obtained as a result of CIA's RDI effort. As we did in that response, we note here that in commenting on the value of the information derived from detainees, we are not arguing in favor of the decision to use the enhanced techniques to which these detainees were subjected. We are not endorsing those techniques, we are not making an "ends-justify-the-means" case for them, nor are we implying that those techniques were the only way to obtain the information from detainees. We only are assessing the accuracy of CIA's representations in response to the *Study's* allegations that those representations were false.

(U~~//FOUO~~) Based on our review, we concluded that all the examples fit within and support the Agency's overall representations that information obtained from CIA interrogations produced unique intelligence that helped the US disrupt plots, capture terrorists, better understand the enemy, prevent another mass casualty attack, and save lives. In some of the Agency's representations, however, CIA failed to meet its own standards for precision of language and we acknowledge that this was unacceptable. However, even in those cases, we found that the actual impact of the information acquired from interrogations was significant and still supported CIA's overall judgments about the value of the information acquired from detainees.

(U~~//FOUO~~) **Summary of the 20 Examples**. In one of the 20 examples (#2), we found that CIA mischaracterized on several occasions, including in prominent representations such as President Bush's 2006 speech, the impact of information on specific terrorist plotting acquired from a set of CIA interrogations.

- ~~(U//FOUO)~~ CIA said the information "helped stop a planned attack on the US Consulate in Karachi," when the Agency should have said it "revealed ongoing attack plotting against the US official presence in Karachi that prompted the Consulate to take further steps to protect its officers."

(U~~//FOUO~~) There were four examples (#1,# 3, #5, and #17) in which CIA used imprecise language or made errors in some of its representations that, although deeply regrettable, did not significantly affect the thrust of those representations.

(U~~//FOUO~~) In another four examples, we found single, isolated representations in which CIA was imprecise in describing the relative impact of the information or the manner in which it was acquired.

- (U~~//FOUO~~) In two of these examples (#13 and #18), CIA made mistakes that caused the IG to incorrectly describe in its 2004 *Special Review* the precise role that information acquired from KSM played in the detention of two terrorists involved in plots against targets in the US. These were not "frequently cited" or "repeatedly represented" as the *Study* claims. Numerous other representations of one of these cases were accurate; we found no other representations for the other.
- (U~~//FOUO~~) In two examples (#9 and #10), we found a one-time error not noted in the *Study*. In a set of talking points prepared for DCIA, CIA incorrectly said enhanced interrogation techniques

played a role in acquiring two important pieces of information about KSM. In the Agency's other representations, including our most prominent, we stated correctly that this information was acquired during initial interviews of Abu Zubaydah.

(U~~//FOUO)~~ In the other 11 examples, we determined that CIA's representations were consistently accurate, in contrast to the *Study*, which claims the Agency misrepresented them all.

1. (U) The Dirty Bomb Plot/Tall Buildings Plots and/or the Capture/Arrest of Jose Padilla

"~~(S//OC/NF)~~ There was intelligence in CIA databases independent of the CIA interrogation program to fully identify Jose Padilla as a terrorist threat and to disrupt any terrorist plotting associated with him."

~~(S//~~[redacted]~~/NF)~~ CIA's representations that Abu Zubaydah's information allowed us to identify US citizen Jose Padilla as an al-Qa'ida operative tasked to carry out an attack in the US were largely accurate. We acknowledge that it took us too long to stop making references to his infeasible "Dirty Bomb" plot and to consistently and more accurately cite him as a terrorist directed to attack high rise apartment buildings. Despite the imprecision of our language, we continue to assess it was a good example of the importance of intelligence derived from the detainee program.

~~(S//~~[redacted]~~/NF)~~ CIA believes the *Study* overstates the value and clarity of reporting on Jose Padilla in CIA databases prior to Abu Zubaydah's debriefings. As it played out at the time, the combination of a suspicious traveler report [redacted] and Abu Zubaydah's information allowed us to identify Padilla and the threat he posed. Abu Zubaydah revealed this information after having been subjected to sleep deprivation, which would be categorized as an enhanced interrogation technique once the program was officially underway.

- ~~(S//~~[redacted]~~NF)~~ The first report—unremarkable at the time—[redacted] identifying Padilla as a "possible illegal traveler" using a US passport, prompting CIA [redacted] to request traces on him.[1] In a follow-up cable on Padilla's co-traveler, later identified as Binyam Muhammad, [redacted] speculated in the final paragraph that [redacted] passed the names of the travelers because they had concerns about "possible terrorist activity."[2] Contrary to the *Study's* statement that "CIA *knew* Jose Padilla…was suspected by the Pakistani Government of being engaged in possible terrorist activity,"[3] the actual cable reads, "At this juncture, [redacted] *does not know* if there is more to these trace requests other than a desire to root out illegal travelers or suspected terrorist [sic]."[4] (emphasis added)

- ~~(S//~~[redacted]~~NF)~~ The importance of that report only became apparent ten days later, when Abu Zubaydah described a terrorist plot by two individuals matching [redacted] descriptions of Padilla and Muhammad.[5] [redacted] immediately linked the reports and [redacted] Muhammad, who was already in Pakistani police custody for using a fake passport.[6][7] Within two days, and based on the Abu Zubaydah report, the CIA [redacted][8] alerted other USG agencies to the threat,[9][10] [redacted][11]

- ~~(S//~~[redacted]~~NF)~~ We judge that both reports were important; CIA would not have known the operatives' true names without the report [redacted] and Abu Zubaydah's subsequent information added the context necessary to make this report stand out as something more than a routine "illegal traveler" report, which was particularly important due to the absence of Jose Padilla's name in any CIA records.

- ~~(S//OC/NF)~~ The *Study* cites "significant intelligence"[12] available on Padilla independent of CIA detainee information, but the only documents—aside [redacted] suspicious traveler report—that mention his name were two internal State Department emails about a suspicious passport request in 2001; these emails were not in CIA databases.. All other citations included only general descriptors—such as his nationality or the languages he spoke—but did not provide his name. The most detailed report was an undisseminated document in FBI's possession that contained Padilla's birth date, alias, and language skills. Contrary to the *Study's* claim—which was based on a personal email containing a recollection of an FBI officer—a review of CIA databases reveals no record of this document. We did, however, find documentation indicating the FBI official who believed the CIA provided the document had confused the operation where this document was recovered with a separate operation, likely explaining the error in the *Study*. [13]

~~(S//OC/NF)~~ The *Study* also claims Abu Zubaydah had already provided the "Dirty Bomb" plot information to FBI interrogators prior to undergoing CIA interrogation, but this is based on an undocumented FBI internal communication and an FBI officer's recollection to the Senate Judiciary Committee seven years later. While we have considerable information from FBI debriefings of Abu Zubaydah, we have no record that FBI debriefers acquired information about such an al-Qa'ida threat.

- ~~(S//OC/NF)~~ The *Study* also states that enhanced techniques were only established after Abu Zubaydah revealed the information on Padilla, implying that enhanced techniques could not have played a role in Abu Zubaydah's description of Padilla. This is technically accurate because enhanced techniques had not been formally designated as such until after Padilla was arrested. However, Abu Zubaydah had been subjected to sleep deprivation prior to revealing the information to CIA or FBI. Thus, CIA correctly represented Abu Zubaydah's description of Jose Padilla as an example of information provided after an individual had been subjected to enhanced interrogation techniques.

~~(S//OC/NF)~~ We assess to this day that Padilla was a legitimate threat who had been directed to use his training in Afghanistan, funding from al-Qa'ida, and US passport to put together a plan to attack tall residential buildings. It took us until 2007 to consistently stop referring to his association with the "Dirty Bomb" plot—a plan we concluded early on was never operationally viable.

2. (U) The Karachi Plots

~~(S//OC/NF)~~ *"A review of CIA records found the CIA interrogation program and the CIA's enhanced interrogation techniques—to include the waterboard—played no role in the disruption of the Karachi Plot(s). CIA records indicate that the Karachi Plot(s) was thwarted by the arrest of operatives and the interdiction of explosives* [redacted]

~~(S//NF)~~ CIA acknowledges that on several occasions, including in prominent representations such as President Bush's 2006 speech, we mischaracterized the impact of the reporting we acquired from detainees on the Karachi plots. We said the information "helped stop a planned attack on the US Consulate in Karachi," when we should have said it "revealed ongoing attack plotting against the US official presence in Karachi that prompted the Consulate to take further steps to protect its officers."

~~(S//OC/NF)~~ Pakistan's arrest on 29 April 2003 of al-Qa'ida operatives Ammar al-Baluchi and Khallad Bin Attash disrupted an al-Qa'ida plot to attack the US Consulate in Karachi. However, that was only one of several "Karachi plots." Ammar and Khallad provided new information on other attack plans in Karachi after entering CIA custody and undergoing enhanced interrogation techniques.[14]

- ~~(S//OC/NF)~~ Ammar on 29 April told [redacted] that he planned to attack the US Consulate using an explosives-filled helicopter and claimed the attack was still in the nascent stages. On 11 May he told [redacted] that there were no current plans to attack the Consulate.[15][16] During his first interrogation session in CIA custody and after enhanced techniques commenced, he revealed that the plan was to use a motorcycle bomb and a car bomb in a single, coordinated attack at the end of May or early June, and he pointed to the location on the Consulate's perimeter wall where the attack would occur.[17][18][19]

- ~~(S//OC/NF)~~ Khallad repeatedly denied knowing of any operations in Pakistan [redacted] After his transfer to CIA custody on 17 May—and after being subjected to enhanced techniques—he admitted the plotting details Ammar had provided and claimed that Khalid Shaykh Muhammad (KSM) had approved the US Consulate plot in February.[20]

- ~~(S//OC/NF)~~ During CIA interrogations, Ammar and Khallad admitted they were also planning to attack a Consular vehicle using a motorcycle bomb, Westerners at the Karachi airport, and a neighborhood where Westerners lived.[21][22] CIA representations about the value of this reporting should have made clear that it caused the US and Pakistan to take additional security measures related to those targets, including relocating [redacted] officers and working with the State Department's Regional Security Office (RSO) to increase physical security in the neighborhood. However, we have no information specifically indicating whether the additional Karachi plotting was disrupted by those measures, by Pakistan's detention of Ammar, Khallad, and other extremists, or by other unknown factors.

~~(S//OC/NF)~~ *"CIA had information regarding the Karachi terrorist plotting as early as September 11, 2002."*

~~(S//OC/NF)~~ The plots disrupted with the arrest and interrogation of Ammar and Khallad were separate from the plot referenced in the so-called "perfume letter," which we obtained on 11 September 2002 during [redacted] raid on an al-Qa'ida safehouse in Karachi. The letter contained coded references to operations, but CIA did not understand the codes until KSM explained them during interrogation. [a][23][24]

- ~~(S//OC/NF)~~ On 5 March 2003—after initial enhanced techniques but before waterboarding—KSM explained that the word "perfume" referred to types of conventional explosives, not poisons as CIA interpreted originally; that "animals" was not a reference to chemical or poison tests, but to vehicles; and that the word "hotels" referred to actual hotels in Karachi, which he then identified.[25][26][27]

- ~~(S//OC/NF)~~ Khallad on 17 May 2003 confirmed that the plot against Karachi hotels, which KSM said the letter referenced, was disrupted on 11 September 2002, but that Ammar intended to use the explosives he had stashed for that operation to target the US Consulate.[28]

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[a] CIA cable traffic shows that before KSM's debriefings in March 2003, analysts believed the "perfume letter" authorized a chemical or poison attack against an unknown target.[aa]

3. (U) The Second Wave Plot

"(U) *The CIA Interrogation Program played no role in the "disruption" of the "Second Wave" plotting and the identification of the al-Ghuraba group."*

~~(S//~~[redacted]~~NF)~~ CIA continues to assess that the capture of Southeast Asia-based al-Qa'ida operations planner Hambali in 2003, which resulted in large part from information obtained from Khalid Shaykh Muhammad (KSM) (see Example 8), was a critical factor in the disruption of al-Qa'ida's plan to conduct a "Second Wave" attack involving multiple airplanes crashing into buildings on the US West Coast. Based on our understanding of al-Qa'ida's persistence in the pursuit of plots and KSM's own assessment, we judge that Hambali remained capable of directing the plot at the time of his arrest, even though other operatives involved in the plan had been arrested in 2002. We agree with the *Study* that some of our representations incorrectly claimed that we first "learned" of the overall plot and a related cell of students through CIA interrogations, but despite our imprecision, we continue to assess this was a good example of the importance of intelligence derived from the detainee program.

~~(S//OC/NF)~~ CIA continues to assess that information obtained from CIA interrogations of KSM helped us disrupt plotting for a "Second Wave" aircraft attack on the US West Coast by identifying Hambali's role in the plot and by giving us information that helped lead to his capture and the detention of a group of students who almost certainly were slated to be part of the same plot.[b] In turn, Hambali provided information during our interrogations of him that helped us understand the purpose of the students whom he had selected and sent to Karachi.

- ~~(S//~~[redacted]~~/NF)~~[redacted]detainee Masran bin Arshad in early 2002 first told[redacted]about al-Qa'ida's plot to attack the US West Coast, his involvement in it, and several individuals participating.
- ~~(S//OC/NF)~~ The following year we learned of Hambali's involvement from KSM, who provided this information after having undergone enhanced interrogation techniques in CIA detention. KSM stated in June 2003 that while his own efforts with this plan ended with the arrest of Masran, he believed Hambali—whose efforts he had enlisted—could still successfully execute an aerial attack in the future, suggesting a variation of the plot could still have been underway.[29] KSM also admitted he had tasked Hambali to recruit other non-Arab passport-holders to serve as pilots for the plot.
- ~~(S//OC/NF)~~ CIA at the time already sought to detain Hambali due to his role as a senior al-Qa'ida figure in the group's Southeast Asian network, and knowledge of his role in the plot only strengthened our resolve to locate and capture him.
- ~~(S//~~[redacted]~~/NF)~~ After his arrest in mid-August 2003 (see Example 8), Hambali quickly admitted to having been associated with Masran's cell, conceded more details of his involvement, and by early September had confessed that KSM had asked him to choose four people for a suicide operation involving individuals associated with the original Masran plot.[30][31][32]
- ~~(S//OC/NF)~~ When faced with news of Hambali's detention, KSM provided information on the role played by Hambali's brother, Pakistan-based Gun Gun Ruswan Gunawan. Gunawan was

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[b] For a more detailed account of Hambali's capture in 2003, please see Example Study #8, page 17.

subsequently detained by [redacted] based at least in part on KSM's intelligence, and he told us of a group of al-Qa'ida-associated students whom Hambali had selected and sent to Karachi. [redacted]

- ~~(S//OC/NF)~~ Hambali, after having undergone enhanced techniques in CIA detention, admitted he had hand-picked these students in response to KSM's request and that some were being groomed as pilots for unspecified al-Qa'ida operations.[36] Hambali did subsequently recant this statement, claiming he made it to satisfy his interrogators and relieve the pressure of enhanced techniques. We continue to assess his original revelation was correct, however, based on KSM's claim that he tasked Hambali to identify and train pilots, Hambali's verification of this claim in multiple instances, and the students' interest in aircraft and aviation.[3738]

~~(S//OC/NF)~~ The *Study's* conclusion that KSM's information played no role in disrupting the attack appears to rest on the assumption that a change to any one element of a plot—such as the capture of an operative or exposure of an attack method—would have derailed the entire plan. In reality, al-Qa'ida has demonstrated its willingness and ability to adapt its plans, especially for is most ambitious operations, in response to unexpected developments.

- ~~(S//OC/NF)~~ KSM admitted to having already adjusted his plans following some of the arrests, noting that he identified a new operative—Masran—to replace one of the arrested original three, Zacharias Moussaoui. He also stated that while his own efforts with this plan ended with the arrest of Masran, he believed Hambali—whose efforts he had enlisted—could still successfully execute a future aerial attack.
- ~~(S~~[redacted]~~NF)~~ The *Study* highlights the arrest of Richard Reid in December 2001 and Masran's claim that this arrest and the revelation of al-Qa'ida's use of explosives in shoes derailed the plot, prior to any detainee reporting.[41] We would note, however, that KSM discussed with Masran after Reid's arrest a planned attack using the specific "method of Richard Reid,"[42] and that other al-Qa'ida operatives until at least 2004 continued to plan to use variations of this technique.

~~(S//OC/NF)~~ The *Study* correctly points out that we erred when we represented that we "learned" of the Second Wave plotting from KSM and "learned" of the operational cell comprised of students from Hambali. We knew about the overall plotting well before KSM's arrest, although he gave us important information that helped us disrupt Hambali's role in it. The student cell was arrested because of information provided by Hambali's brother [redacted] who had been arrested due in part to information obtained from KSM. Information obtained from KSM and Hambali after enhanced techniques revealed the significance of the cell in the context of the Second Wave plotting.

4. ~~(S//NF)~~ The UK Urban Targets Plot and/or the Capture/Arrest of Dhiren Barot, aka Issa al-Hindi

"~~(S//OC/NF)~~ The intelligence that led to Issa al-Hindi's true name, his capture, and the uncovering of his UK plotting came from intelligence sources unrelated to the CIA detention and interrogation program."[43]

~~(TS/~~[redacted]~~NF)~~ CIA accurately represented that Khalid Shaykh Muhammad (KSM) provided the initial lead to a UK-based al-Qa'ida operative named Dhiren Barot, aka Issa al-Hindi, whom KSM had tasked to case US targets. That information allowed us to identify this Issa as Barot and ultimately led British authorities to arrest him. In arguing that CIA already had what it needed to identify and arrest Barot, the *Study* confuses two different extremists using the name Issa and cites intelligence that was not operationally useful absent KSM's information, or was gathered because of his information.

~~(S//OC/NF)~~ CIA continues to assess that information KSM provided in March 2003 after the application of enhanced interrogation techniques was vital to the identification and capture of Dhiren Barot, aka Issa al-Hindi, aka Issa al-Britani, a UK-based terrorist whom KSM had tasked to collect information on US targets. The *Study's* key finding hinges on the availability of information about Issa and his activities on behalf of al-Qa'ida prior to KSM's March 2003 debriefings. However, the documentation cited in the *Study* as evidence CIA had prior to KSM's debriefings refers to the wrong person, was acquired after KSM's debriefings, or was so vague that it was of no use until KSM put it into context. References to information acquired later—which accurately described the right person—fail to note that the information was only pursued in response to KSM's debriefings.

- ~~(S/~~[redacted]~~NF)~~ The *Study* cites 2002 reporting from detainees [redacted] at Guantanamo Bay on an Issa from Britain linked to KSM and plotting in the UK, but each of those reports actually referred to Sajid Badat, a different UK extremist also known as Issa.[44] The Guantanamo Bay detainees—one of whom photo identified Badat as "Issa"—served in a small cell with Badat in Qandahar.[45] The detainee [redacted] described an Issa who attended the Arab Studies Institute in Qandahar in 1999, where he translated for several Westerners, also consistent with Badat.[46][47]

- ~~(S//OC/NF)~~ The *Study* inaccurately characterizes information the CIA acquired in September 2003—regarding the *correct* Issa (Barot)—as "CIA information acquired in 1999."[48][49] This reporting, which links Issa to another UK extremist, addresses events in 1999, but was collected [redacted] in 2003 in response to the KSM debriefings.

- ~~(S//OC/NF)~~ The *Study* rightfully credits interviews of two individuals in FBI and DOD custody as playing an important role in advancing and focusing the investigation, but it fails to note that these interviews (conducted in May 2003) and the specific questions asked were a direct result of reporting disseminated from KSM in March 2003.[50]

~~(S//OC//NF)~~ The *Study* highlights and mischaracterizes two pieces of information in CIA's intelligence holdings from 1999 and 2000, which CIA in June 2003 found in hindsight to reference a book Issa wrote, but this information did not name him or link him to any threat.[51][52] These bits of information were of no apparent consequence until KSM commented that Issa had "authored a well-known book about the jihad in Kashmir,"[53] which allowed [redacted] to prioritize identifying this book and its author as a lead to Issa, thus putting these otherwise obscure references into useful context.

- ~~(S//OC/NF)~~ The first piece of information the *Study* cites was contained in a set of more than 30 intelligence reports containing hundreds of pages of documents seized on a Pakistani raid of an al-

Qa'ida-linked establishment in 1999. In one seized email, the author cites the name and topic of Issa's book, but identifies the author only as an Afghanistan-trained British convert writing about Hindu atrocities in Kashmir.[54]

- ~~(S//OC/NF)~~ The second piece of information is a 105-page financial document seized during a raid in the UK, in which Issa's book is listed on the invoice in a bookstore run by UK extremist Moazzem Begg.[55] The document includes only the book's title and no further information to identify Issa.

~~(S//OC/NF)~~ The push to identify Issa's true name and location came in response to KSM's unique and accurate information on his tasking of Issa in 1999 or 2000 to travel to the United States to collect information on economic targets in New York for al-Qa'ida—and that Bin Ladin had sat privately with Issa to impart the same tasking.[56][57] One of the key avenues of inquiry that KSM's information prompted involved Issa's links to the UK-based "Hubaib Group," which KSM reportedly used to contact and send money to Issa.

- ~~(S/~~[redacted]~~/NF)~~ KSM claimed the group was led by Abu Khubayb,[58][59] and, based on the disseminated reports CIA shared with UK [redacted] was able to identify Abu Khubayb as UK-based extremist Babar Ahmed.[60]

- ~~(S/~~[redacted]~~/NF)~~ This information enhanced British investigative scrutiny of Babar Ahmed and his group and ultimately enabled [redacted] identification in early 2004[61] of a cousin of Babar Ahmed. That cousin turned out to be Abu Talha al-Pakistani, a senior al Qa'ida facilitator whom KSM in 2002 had tasked to assist with attacking London's Heathrow Airport.

~~(S/~~[redacted]~~/NF)~~ The *Study* accurately characterizes Abu Talha al-Pakistani's July 2004 arrest [redacted] and subsequent debriefings [redacted] as having proved invaluable to our overall understanding of Issa's activities and the threat he posed, suggesting we did not need CIA detainee reporting to learn of Issa's UK plotting. The *Study* fails to recognize that Abu Talha's arrest—a case CIA frequently cited as a success of the detainee program—would not have happened if not for reporting from CIA-held detainees.

- ~~(S//OC/NF)~~ In an effort to uncover information about plotting against Heathrow Airport, the CIA questioned Ammar al-Baluchi, KSM, and Khallad bin Attash about personalities who could be involved, and all three highlighted Abu Talha al-Pakistani.[62][63][64] In all cases, the information was provided after the commencement of enhanced techniques.

- ~~(S//OC/NF)~~ When Hassan Gul was later in CIA custody, he provided a more current update on Abu Talha's activities. Gul reported that Abu Talha was working on some external operation and had sought out the new external operations chief following the arrests of KSM, Ammar, and Khallad.[65][66]

- ~~(S/~~[redacted]~~/NF)~~ Given the threat implications of this reporting, the USG and UK authorities made identifying and disrupting Abu Talha a top priority. Through [redacted] KSM-spurred investigation of the Abu Khubayb/Babar Ahmed group, by early 2004 [redacted] Pakistani Mohammed Naim Noor Khan as possibly being the operative known as Abu Talha. CIA [redacted] worked with relevant sources to locate him, ultimately leading to his capture [redacted]

~~(S/~~[redacted]~~/NF)~~ Information from KSM also played a role in confirming the identity of an Issa candidate once he was located by UK authorities. While we were pursuing Abu Talha [redacted]

[redacted]

[redacted] 7172

5. (U) The Capture/Identification/Arrest of Iyman Faris

"(U) *The intelligence that led to the identification of Iyman Faris was unrelated to the CIA detention and interrogation program.*"[73]

~~(S//NF)~~ CIA most often represented accurately that Khalid Shaykh Muhammad's (KSM) information enhanced the FBI's understanding of the role of Iyman Faris, a US-based extremist whom KSM tasked to support an attack against the Brooklyn Bridge. In a few cases, we incorrectly stated or implied that KSM's information led to the investigation of Faris, but we should have stated that his reporting informed and focused the investigation. Nonetheless, we continue to assess it was a good example of the importance of intelligence derived from the detainee program.

~~(S//OC//NF)~~ We have reviewed our representations and assess that most of them accurately capture the contribution made by information obtained from interrogations of KSM. We most often represented this case as follows:

- ~~(S//OC/NF)~~ "KSM described an Ohio-based truck driver whom the FBI identified as Iyman Faris, and who was already under suspicion for his contacts with al-Qa'ida operative Majid Khan. The FBI and CIA shared intelligence from interviews of KSM, Khan, and Faris on a near real-time basis and quickly ascertained that Faris had met and accepted operational taskings from KSM on several occasions." This statement is accurate and appeared in representations to the Department of Justice, the White House, the SSCI, and CIA finished intelligence production.

~~(S//OC/NF)~~ In a small number of other representations, we imprecisely characterized KSM's information as having "led" to the investigation of Iyman Faris, rather than more accurately characterizing it as a key contribution to the investigation. For example, our officers' statements—as reflected in the 2004 Inspector General's (IG) *Special Review*—that KSM's information "led to the investigation and prosecution of Iyman Faris" were inaccurate. The specific chain of events was:

- ~~(S/~~[redacted]~~NF)~~ FBI identified Faris on 5 March 2003 as one resident of a house that received a suspicious phone call, prompting FBI to open preliminary inquiries—and on 11 March, a full field investigation—into the residents.[74][75][76] During 11-14 March debriefings, Pakistani extremist Majid Khan [redacted] photo-identified Faris as an extremist who worked as a truck driver, kept multiple girlfriends, lived in the Midwest, and wanted to work on a business project with his father.[77][78][79] Khan did not know Faris' true name or implicate him in any al-Qa'ida plotting.

- ~~(S/~~[redacted]~~NF)~~ On 18 March, CIA disseminated KSM's photo-identification and description of Faris as an Ohio-based truck driver who was very interested in business, kept multiple girlfriends, and whom he had tasked with procuring machine tools for a potential attack against a US suspension bridge.[80][81] KSM's information allowed debriefers to confront Majid Khan, who then provided much greater detail on Faris' terrorist ties.[82]

- ~~(S/~~[redacted]~~NF)~~ FBI on 20 March conducted a previously planned interview with Faris, and—armed with the information revealed by KSM and Majid Khan—asked Faris to begin discussing his ties with KSM and al-Qa'ida plotting in the US. FBI submitted further questions to CIA to be used with KSM "to advance the interview with Faris," and noted FBI's appreciation for the close collaboration on the case.[83]

~~(S//OC/NF)~~ We do not agree with the *Study's* claim that, "CIA records indicate there was significant intelligence on lyman Faris and targeting of suspension bridges acquired prior to—and independently of—the CIA detention and interrogation program." [84]

- ~~(S//OC/NF)~~ The *Study's* accompanying intelligence chronology includes only one non-detainee report that references suspension bridges, and that reference was to West Coast suspension bridges (the lyman Faris plot was against the Brooklyn Bridge).
- ~~(S//OC/NF)~~ The FBI's earlier investigation of lyman Faris—cited by the *Study* as evidence of available intelligence on him—was opened and closed in 2001 and not disseminated in CIA channels. The first reference to him in CIA records is on 6 March 2003, and it states, [redacted] surfaced no [search results] on lyman Faris."[85]

6. ~~(S//NF)~~ The Capture/Identification/Arrest of Sajid Badat

"~~(S//OC/NF)~~ The CIA Detention and Interrogation Program produced no unique intelligence leading to the identification and arrest of Sajid Badat."

~~(S//OC/NF)~~ CIA accurately represented that Khalid Shaykh Muhammad's (KSM) information was central to our efforts to identify and enable British liaison to arrest Sajid Badat, an al-Qa'ida operative who originally planned to conduct a shoe bomb attack aboard an airplane. KSM was the first to tell us there was a second shoe bomber and that he remained at large, and he provided sufficient details to allow CIA and British authorities to identify Badat. Fragmentary information implied a second shoe bomber existed before KSM's detention, but this information was either inconclusive or not available to CIA.

(~~S//OC/NF~~) CIA assesses that detainees, particularly KSM, did provide unique intelligence that helped lead to the identification of Sajid Badat as the would-be second shoe bomber and his subsequent arrest by UK authorities in 2003.

~~(S//OC/NF)~~ The *Study's* finding on Badat hinges on the premise that investigations of existing intelligence eventually would have led to a similar outcome—the identification and arrest of Badat in the UK and the recovery of his shoe bombs—even if we had never received the intelligence from KSM. As a matter of course, we cannot rule out any hypothetical possibility. In reality, though, KSM's reporting was central to the investigations that led to Badat's arrest.

- ~~(S//OC/NF~~) The *Study* states that by 14 January 2002, the FBI investigation of Richard Reid found Reid "had an unidentified partner who allegedly backed out of the operation at the last minute."[86] There is no reference to this possibility in official communications between FBI and CIA, nor did it exist in any searchable CIA data repositories prior to KSM's reporting.

- ~~(S//OC/NF)~~ In response to FBI information that a "Badad Sajid" from the UK was linked to Richard Reid and was one of 13 persons characterized by a [redacted] detainee as "involved in operations targeting American interests,"[87] CIA in summer 2002 noted that "Sajid" may be identifiable with one Sajid Badat, on whom we had little existing derogatory reporting.[88] At this time we were following many disparate individuals who were allegedly threatening US interests, and there was nothing at the time on Badat to lead us to prioritize him over the others or to tie him to a shoe bomb plot.

- ~~(S//OC/NF)~~ The *Study* accurately highlights a body of reporting from detainees not in CIA custody—disseminated prior to KSM's arrest—that collectively described a British al-Qa'ida operative of Indian descent known as "Issa" who was linked to KSM, was probably involved in operations in the UK, and was a Richard Reid associate. In hindsight, it is reasonable to assess that we should have included Badat on the list of potential matches for this unknown individual, but our review of the records indicates no one had suggested Badat could be a candidate for this Issa until KSM's reporting. In addition, no one suggested a link to Reid's shoe bombing attempt.

- ~~(S//OC/NF)~~ The fact that the [redacted] as late as August 2003 was only able to locate a poor quality photo of Sajid Badat belies the notion that Badat was well on his way to being identified as important and disrupted in advance of KSM's reporting.

~~(S//OC/NF)~~ KSM was the first person to provide—in March 2003, after having undergone enhanced interrogation techniques in CIA custody—a detailed and authoritative narrative of al-Qa'ida development of and plans to use shoe bombs operationally.[899091] KSM's narrative included the fact that there was a second shoe bomber still at large who was a close associate of Richard Reid and who was also from the United Kingdom; KSM provided a detailed description of Reid's mystery partner to include the fact that he was known by the operational alias name of Issa.[92]

- ~~(S//OC/NF)~~ KSM was explicit that there was a second pair of shoe bombs unaccounted for, a fact that was not available in any other reporting at the time.[93]

- ~~(S//OC/NF)~~ KSM's reporting also clearly distinguished between, and thereby focused investigations of, two al-Qa'ida operatives known as Issa al-Britani—one turning out to be Badat, the other Dhiren Barot aka Issa al-Hindi.[94] No other single source had the same degree of knowledge about both individuals—including their compartmented operational activities for al-Qa'ida.

- ~~(S/~~[redacted]~~/NF)~~ Once [redacted] were able to locate and provide to CIA a high quality photograph of Badat on 3 September 2003, KSM identified it with "100 percent certainty" as the Issa he had described as Reid's partner and would-be shoe bomber.[95] KSM's identification of Badat was more important than others who also recognized the photograph—including one who identified the photo a day before KSM did—because only KSM at the time had characterized this Issa as a partner to Reid and as a would-be shoe bomber.

7. (U) The Heathrow/Canary Wharf Plotting

"(U) *The CIA Interrogation Program played no role in the disruption of the Heathrow and Canary Wharf plotting.*"

~~(S//OC/NF)~~ CIA disagrees with the *Study's* assessment that we incorrectly represented that information derived from interrogating detainees helped disrupt al-Qa'ida's targeting of Heathrow Airport and Canary Wharf in London, including in President Bush's 2006 speech on the Program. Detainee reporting, including some which was acquired after enhanced interrogation techniques were applied, played a critical role in uncovering the plot, understanding it, detaining many of the key players, and ultimately allowing us to conclude it had been disrupted. It is a complex story, however, and we should have been clearer in delineating the roles played by different partners.

- ~~(S//~~[redacted]~~/NF)~~ As we highlight in our response to Example 11, the information provided by Abu Zubaydah played a key role in the capture of Ramzi Bin al-Shibh. It was from Bin al-Shibh, [redacted] that we first heard of Khalid Shaykh Muhammad's (KSM) plot to attack Heathrow. In our custody, Bin al-Shibh told us how he learned of the attack along with where preparations stood and KSM's contingency plans to scale back the plot if necessary, to keep it viable.[96]

- ~~(S//~~[redacted]~~/NF)~~ Zubaydah's reporting also contributed to KSM's arrest—a point we note in our response to Example 12—as did information provided by Bin al-Shibh [redacted] By all accounts, KSM's arrest was the action that most disrupted the plot.

- ~~(S//~~[redacted]~~/NF)~~ CIA obtained updated information from KSM about the plot to attack Heathrow Airport and Canary Wharf after he had been subjected to enhanced techniques, including the information on the individual managing the plot, Abu Talha al-Pakistani.

- ~~(S//~~[redacted]~~/NF)~~ CIA lacked reporting on Abu Talha prior to March 2003 and first learned of his specific role in the plot from debriefing KSM; al-Qa'ida operatives Ammar al-Baluchi and Khallad Bin Attash during interrogations in CIA custody later corroborated KSM's information .[97] KSM admitted to tasking Abu Talha in 2002 to conduct surveillance of Heathrow Airport's security and to gather time tables of flights there. He added that it was Abu Talha who first raised Canary Wharf as a potential target.[98]

- ~~(TS/~~[redacted]~~NF)~~ KSM also was responsible for helping us identify two potential operatives—known only as Abu Yusef and Abu Adil—whom al-Qa'ida had deployed to the United Kingdom by early 2002 and whom KSM wanted to tap for a role in a future Heathrow operation. The pair was unwitting of KSM's intent to direct them against Heathrow—an example of al-Qa'ida's tight compartmentation of external attack plans—and had fallen out of contact with KSM's lieutenants, but we assess they remained potential threats until their full identification by UK authorities.

- ~~(S//~~[redacted]~~/NF)~~ Based in part on our intelligence, [redacted] detained Abu Talha—an action that strengthened our confidence at the time that the plot was disrupted. [redacted] he acknowledged he had been working to advance the plot and had briefed it to Hamza Rabi'a, al-Qa'ida's chief of external operations. Rabi'a, however, assessed the plot had been compromised by KSM's arrest, and Abu Talha abandoned the effort.

~~(S//OC/NF)~~ While we assess detainee reporting did play a key role in disrupting the Heathrow plot, it is a complex story, and we should have been more precise at times in laying out our argumentation. Our operational success was based both on information we acquired from detainees after they had been subjected to enhanced techniques as well as information gleaned from [redacted] in response to questions we had provided. In reviewing the array of representations we made on this subject, there are a few in which we mentioned only one aspect of the story instead of providing a better sense of the richness of the effort. In these cases, we should either have used more representative examples or, better, provided a fuller accounting.

8. (U) The Capture of Hambali

"~~(S//OC/NF)~~ A review of CIA records found that CIA representations that KSM's reporting led to or played a role in the capture of Hambali are inaccurate. The review concluded there was sufficient intelligence in CIA databases acquired independently of the CIA detention and interrogation program to capture Hambali on August 11, 2003."

~~(S//NF)~~ CIA accurately cited Khalid Shaykh Muhammad's (KSM) reporting as a crucial link in a chain of events that led to the capture of Hambali. KSM provided information on an al-Qa'ida operative named Zubair, we shared that lead with Thai authorities, they detained Zubair, and he gave actionable information that helped us identify Hambali's location. Although we had some other information linking Zubair to al-Qa'ida's Southeast Asian network, the record shows clearly that it was KSM's information that caused us to focus on him as an inroad to Hambali, so we continue to assess this is a good example of the importance of intelligence derived from detainee reporting in helping to capture other terrorists.

~~(S//OC/NF)~~ CIA continues to assess that KSM's reporting played a role in the capture of Hambali on 11 August 2003. Other information acquired independently of the CIA detention and interrogation program contributed as well, but KSM's information was an important piece of the puzzle.

- ~~(S//~~[redacted]~~NF)~~ Majid Khan [redacted] in early March said he had delivered money to a "Zubair" in Thailand in December 2002.[99] While we had some reporting on Zubair and his connections to al-Qa'ida's Southeast Asian network, we did not have sufficient information to focus us on him or lead us to view him as an inroad to Hambali until KSM told us in mid-March that he had tasked Khan to deliver the money to unnamed individuals working for Hambali.[100] This information allowed us to connect Zubair to Hambali.[101]
- ~~(TS//~~[redacted]~~NF)~~ Thai [redacted] detained Zubair on 8 June.
- ~~(S//OC/NF)~~ During [redacted] debriefings, Zubair reported on the [redacted] and corroborated reporting on the [redacted] [redacted] This information when combined with reporting from other sources to form a complete picture of Hambali's status was critical in helping[108] identify Hambali's general location and led to his arrest on 11 August [redacted]

9. (U) The Identification of KSM as the Mastermind of the 11 September 2001 Attacks

"~~(S//OC/NF)~~ There is no evidence to support the statement that Abu Zubaydah's information—obtained prior to using the CIA's enhanced interrogation techniques—was uniquely important or played any 'vital' role in the identification of KSM as the 'mastermind' of the 9/11 attacks. This information had been collected independent of the CIA detention and interrogation program and was acquired prior to the detention of the CIA's first detainee."

~~(S//OC/NF)~~ CIA assesses that Abu Zubaydah's admission that Khalid Shaykh Muhammad (KSM) was the mastermind of the 9/11 attacks remains an example of important detainee information. None of the intelligence that preceded Abu Zubaydah's remarks characterized KSM as *the* mastermind of the attacks or provided the same level of clarity on his role. Our records indicate we accurately represented this example seven times. We acknowledge that in one instance—a supporting document for a set of DCIA talking points for a meeting with the President—we mischaracterized the information as having been obtained after the application of enhanced interrogation techniques. We also note that the *Study* incorrectly cites how we used the word "vital" in reference to Abu Zubaydah's information.

~~(S//OC/NF)~~ CIA assesses Abu Zubaydah's information was "important" because it was the most authoritative, detailed account of KSM's role, which, for the first time, singled him out from others involved in the plot as the "mastermind." The *Study's* assertion that we characterized this information as "vital" is incorrect.

- ~~(S//OC/NF)~~ The word "vital" was used in President Bush's 2006 CIA-vetted speech when he said "Zubaydah disclosed Khalid Sheikh Mohammed, or KSM, was the mastermind behind the 9/11 attacks and used the alias Mukthar. This was a vital piece of the puzzle that helped our intelligence community pursue KSM." In this context, "vital" refers to the connection between KSM and the alias Mukthar, which did significantly contribute to our pursuit of KSM.

~~(S//OC/NF)~~ Immediately after the 11 September 2001 attacks, CIA officers debated whether KSM might be involved, or if Abu Zubaydah had conceived of and directed the plot. Cable traffic from November 2001 to April 2002—just before Abu Zubaydah's arrest—shows that CIA had reserved a definitive assessment of KSM's role until it received concrete reporting from a credible source.

- ~~(S//OC/NF)~~ Indeed, between October and January, CIA described KSM as "one of the individuals considered the potential mastermind;"[109] "one of the top candidates for having been involved in the planning for the 11 September attacks;"[110] and "one of the leading candidates to have been a hands-on planner in the 9/11 attacks."[111] Alec Station on 12 April described KSM as a "financier" of the attacks.[112]

~~(S//OC/NF)~~ The *Study* cites five references to KSM that preceded Abu Zubaydah's information. Two of these references are speculative e-mails, one is a vague reference in the 9/11 Commission Report, and two are intelligence reports that did not describe the extent of KSM's role in the same manner as Abu Zubaydah or single out KSM as the "mastermind" of the attack.

- ~~(S//OC/NF)~~ A CIA officer in September 2001 e-mailed another officer speculating that KSM was "one of the individuals who had the capability" to conduct the attacks, and a similar e-mail in October 2001 indicated an officer "believe[d] KSM may have been the mastermind," but that more proof was needed.

- ~~(S//OC/NF)~~ The referenced text from the 9/11 Commission Report does not cite primary source information; it simply repeats the same internal speculations.

- ~~(S//OC/NF)~~ The first of the two intelligence reports indicates KSM was one of three people who had "originated" the "command and planning," along with Abu Zubaydah and an "American" who was with Abu Zubaydah.[113] The report did not distinguish KSM from the other two as the mastermind.

- ~~(S//OC/NF)~~ The second intelligence report only says that KSM supervised the "final touches" of the operation.[114]

10. (U) The Identification of KSM's "Mukhtar" Alias

"(U) *While Abu Zubaydah did provide information on KSM's alias—prior to the initiation of the CIA's enhanced interrogation techniques to FBI interrogators—this intelligence was corroborative of information already collected and known by CIA."*

~~(S//OC/NF)~~ We continue to assess that Abu Zubaydah's information was a critical piece of intelligence. The *Study* is correct that CIA already had an intelligence report that Khalid Shaykh Muhammad (KSM) was using the nickname "Mukhtar" before Abu Zubaydah told us about it. Our review indicates, however, that analysts overlooked this report, and we cannot confidently conclude it would have ended the debate regardless. It is clear that CIA only made a definitive determination that KSM was "Mukhtar" after receiving the information from Abu Zubaydah. We should note that CIA made this representation twice—in the President's 2006 speech and in a supporting document for a set of DCIA talking points for a meeting with the President. The speech made clear that the information was acquired during an initial interview. In the talking points, we mistakenly claimed the information was acquired after Abu Zubaydah had undergone enhanced interrogation techniques.

~~(S//OC/NF)~~ We acknowledge the *Study* is correct that CIA had an intelligence report that identified KSM as "Mukhtar" prior to Abu Zubaydah's information. We have reviewed our records, and we have concluded that our officers simply missed the earlier cable. We can find no instance in which the report spurred an analytic debate about "Mukhtar's" identity. In view of the debate that was underway at the time over multiple reports mentioning "Mukhtar," however, we cannot confidently conclude that this report would have ended the debate because much of the information we had on "Mukhtar" seemed inconsistent with an al-Qa'ida mastermind.

- ~~(TS~~[redacted]~~NF)~~ The details about "Mukhtar's" activities reflected in signals intelligence before March 2002 portrayed him as a document facilitator or someone procuring or disseminating video tapes and arranging travel documents.
- ~~(TS~~[redacted]~~NF)~~ In addition, CIA also knew from signals intelligence that there were several different "Mukhtars" linked to al-Qa'ida, making it more difficult to confidently link Mukhtar to KSM.[115] A CIA cable on 9 April 2002 acknowledged this. The cable, titled "Possible Identification of Khalid Shaykh Muhammad," noted that "we were particularly interested in the information Abu Zubaydah provided on 'Mukhtar'," and indicated that we would be combing through the SIGINT to see which Mukhtars we now could line up as KSM. [116][117]

11. (U) The Capture of Ramzi Bin al-Shibh

"~~(S//OC/NF)~~ *A review of CIA records found no connection between Aby Zubaydah's reporting on Ramzi Bin al-Shibh and Ramzi Bin al-Shibh's capture."*

"~~(S//OC/NF)~~ *CIA records indicate that Abu Zubaydah did provide information on Ramzi Bin al-Shibh, however, there is no indication that Abu Zubaydah provided information on Bin al-Shibh's whereabouts. Further, while Abu Zubaydah provided information on Bin al-Shibh while being subjected to the CIA's enhanced interrogation techniques, he provided similar information to FBI interrogators prior to the initiation of the CIA's enhanced interrogation techniques."*

~~(S//OC/NF)~~ CIA accurately represented that Abu Zubaydah's information helped lead to the arrest of Ramzi Bin al-Shibh, but we should have more clearly explained the contribution his reporting made to this operation. Abu Zubaydah provided information on how to contact another al-Qa'ida member. We passed that information to Pakistani authorities, who used it to set up a broad sting operation that fortuitously netted Bin al-Shibh. Bin al-Shibh's capture would not have occurred that day without Abu Zubaydah's information; it is a good example of how intelligence-driven operations against terrorist networks can yield results that exceed the intended target of the specific operation.

~~(S//OC/NF)~~ CIA assesses that Abu Zubaydah provided key information that "helped lead to the capture of Ramzi Bin al-Shibh." It is true that Abu Zubdaydah provided no information specifically on Bin al-Shibh's whereabouts, but as the *Study* explicitly acknowledges, he did provide information on another al-Qa'ida facilitator that prompted Pakistani action that netted Bin al-Shibh. Although Bin al-Shibh was not the target of the raid, his capture is a good example of how information obtained from detainees led to actions that had a greater impact on the group than one might have expected from any single piece of information.

- ~~(S//OC/NF)~~ Abu Zubaydah stated that if he personally needed to reach Hassan Gul, he would contact [redacted] We provided this information to Pakistani authorities, who then interviewed [redacted] and [redacted] which ultimately led them to an apartment linked to Gul.[118][119][120][121][122]
- ~~(S/~~[redacted]~~NF)~~ [redacted] raided the apartment on 10 September 2002 and detained Gul's brother-in-law, who provided information on Gul's safe houses in Karachi. [redacted] arrested Bin al-Shibh at one of these safe houses the next day.[123]

~~(S//OC/NF)~~ The *Study's* own concluding paragraph on the capture of Ramzi Bin al-Shibh accurately explains this chain of events. The *Study's* concluding paragraph reads:

> ~~(S//OC/NF)~~ *"It is possible that the sourcing for CIA claims that 'as a result of EITs' Abu Zubaydah provided information that 'played a key role in the ultimate capture of Ramzi Bin al-Shibh [sic],' is related to Abu Zubaydah's information that Hassan Gul could be located through* [redacted] *While* [redacted] *did not provide information on Gul's whereabouts,* [redacted] *led Pakistani officials to an apartment once rented by Gul. While surveillance of this apartment led to the capture of unrelated individuals, raids resulting from the interviews of one of these individuals led to the unexpected capture of Ramzi Bin al-Shibh."*

~~(S//OC/NF)~~ Finally, the *Study* states that Abu Zubaydah "provided similar information to FBI interrogators prior to the initiation of the CIA's enhanced interrogation techniques." This is incorrect.

Abu Zubaydah's unique information concerning his contact with Hassan Gul was collected on 20 August 2002, after he had been subjected to enhanced interrogation techniques.

12. (U) The Capture of KSM

"~~(S//OC/NF)~~ A review of CIA operational records results in no indication that information from Abu Zubaydah, Ramzi Bin al-Shibh, or any other detainee, contributed to KSM's capture."

~~(S//OC/NF)~~ CIA correctly represented that detainee reporting helped us capture Khalid Shaykh Muhammad (KSM). The *Study* says that a unilateral CIA source led us to KSM and that detainee reporting played no role. However, the *Study* fails to note that detainees gave us the critical information on KSM [redacted] **that allowed us to understand that our source knew** [redacted]

~~(S/~~[redacted]~~NF)~~ CIA should have been more precise in laying out the role that the various elements of the program played in this complicated case, but we stand by the assessment that detainee information contributed to KSM's capture. We assess that information provided by Abu Zubaydah—after the commencement of enhanced interrogation techniques —helped lead to the capture of Ramzi Bin al-Shibh (see Example 11).[c] CIA subsequently obtained key insights from Bin al-Shibh and [redacted] related to KSM [redacted] which allowed CIA to redirect a source that led us to KSM's location. [redacted][124]

- ~~(S//OC/NF)~~ Bin al-Shibh told [redacted] likely on 21 September 2002, that "the best way to find KSM is to find KSM [redacted] 'Ammar' who is also in Karachi."[125] On 24 September, Bin al-Shibh photo-identified FBI Most Wanted fugitive Ali Abdul Aziz Ali—a primary financier of the 9/11 attacks—as "Amar al-Baluchi," and clarified that he had a "very close relationship with KSM," and "would know how and where to contact KSM."[126] Alec Station on 30 September highlighted Bin al-Shibh's photo-identification as a "breakthrough."[127] [128] [129] [d]
- ~~(S/~~[redacted]~~NF)~~ [redacted] officers on [redacted] used that information to [redacted][130]

~~(S//OC/NF)~~ The detainees' information on [redacted] Although fortuitous, this information helped CIA to redirect the source [redacted] in an effort to locate KSM.[131]

~~(S//OC/NF)~~ The *Study* claims it was this unilateral source, not detainees, who first identified [redacted] This is an incorrect repetition of an error made by a CIA officer in a cable in 2003.

- ~~(S//OC/NF)~~ CIA officers in late 2001 did show the source [redacted][132] [133]

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[c] For a more detailed account of Ramzi Bin al-Shibh's arrest, please see Example 11, page 21.

[redacted]

13. (U) The Capture of Majid Khan

"~~(S//OC/NF)~~ The CIA repeatedly represented that the CIA interrogation program, and/or the CIA's enhanced interrogation techniques, resulted in critical, otherwise unavailable intelligence, related to...the capture of Majid Khan."

~~(S//NF)~~ CIA mistakenly provided incorrect information to the Inspector General (IG) that led to a one-time misrepresentation of this case in the IG's 2004 *Special Review*. This mistake was not, as it is characterized in the "Findings and Conclusions" section of the *Study*, a "repeatedly represented" or "frequently cited" example of the effectiveness of CIA's interrogation program. CIA accurately described the importance of Khalid Shaykh Muhammad's (KSM) information in the Majid Khan case in a number of finished analytic reports and briefings before and after the *Special Review*.

~~(S//OC/NF)~~ Broadly disseminated DI finished intelligence, as well as briefings and materials provided to the SSCI, the White House, the Department of Justice, and the American public—both before and after the *Special Review*—included accurate representations regarding Majid Khan's importance.

~~(S//OC/NF)~~ The standard language we used to describe Majid Khan did not imply KSM's information played a role in his capture and instead focused on the importance of his information as a building block that led to other operational successes. For example, a typical representation stated:

> *"KSM provided information about an al-Qa'ida operative, Majid Khan, who he was aware had recently been captured. KSM—possibly believing the detained operatives was "talking" admitted to having tasked Majid with delivering a large sum of money to individuals working for another senior al-Qa'ida associate. In an example of how information from one detainee can be used in debriefing another detainee in a "building block" process, Khan—confronted with KSM's information about the money—acknowledged that he delivered the money to an operative named Zubair and provided Zubair's physical description and contact number."*

14. (U) The Thwarting of the Camp Lemonier Plotting

"(U) *A review of CIA records found that the plotting against Camp Lemonier was not "stopped" because of information acquired from the CIA detention and interrogation program."*

~~(S//OC/NF)~~ CIA assesses that its representations related to this plot—most notably the CIA-vetted statement in President Bush's 2006 speech that "Terrorists held in CIA custody have also provided information that *helped* stop the planned strike on US Marines at Camp Lemonier in Djibouti" (emphasis added)—were accurate. We did not represent that we initially learned of the plot from detainees, or that it was disrupted based solely on information from detainees in CIA custody.

~~(S//OC/NF)~~ Some information came from detainees in CIA custody, [redacted] No single detainee's information or arrest stopped this plot. Rather, a series of events—several of which were related to CIA's detainee program—helped disrupt it.

- ~~(S//OC/NF)~~ According to Khalid Shaykh Muhammad (KSM), his arrest in March 2003 (which we note in Example 12 resulted in part from information provided by Ramzi Bin al-Shibh) prevented him from transferring 30,000 euros from al-Qa'ida in Pakistan to al-Qa'ida in East Africa leaders, some of whom were plotting the Camp Lemonier attack. [134][135] Funding shortages were cited repeatedly by detainees and in [redacted] as a reason for the Camp Lemonier plot's delays.

- ~~(TS~~[redacted]~~NF)~~ In March 2004, [redacted] based information from a clandestine source—detained and rendered to CIA custody the primary facilitator for al-Qa'ida's Camp Lemonier plot, Guleed Hassan Ahmed, who had cased the Camp on behalf of al-Qa'ida. [136] Guleed provided details about the plot and al-Qa'ida's Somali support network, which drove CIA's targeting efforts. [137][138][139][140]

- ~~(S//OC/NF)~~ We combined Guleed's information with other reporting to build a more detailed targeting picture of al-Qa'ida's East Africa network, helping us to locate [redacted] several other al-Qa'ida couriers, some of whom had been tasked with transferring additional funding to the network.[141][142][143][144][145][146]

~~(S//OC/NF)~~ We agree with the *Study* that we had threat reporting against Camp Lemonier prior to the March 2004 detention and rendition of one of the plot's key facilitators, but we believe the earliest reports cited in the *Study* have no relation to this plot.

- ~~(S/~~[redacted]~~NF)~~ The *Study* states, "CIA first learned of this terrorist threat from [redacted] as early as January 2003."[147] The *Study* cites a PDB article based on [redacted] but that report was later recalled after being revealed to be a fabrication.[148]

- ~~(S//OC/NF)~~ The *Study* cites a Terrorist Advisory from March 2003 that states, "US forces stationed at Camp Lemonier in Djibouti also could be targeted."[149] This reference, however, was not based on specific intelligence reporting and is actually focused on a different al-Qa'ida cell based in Kenya, which was targeting sites primarily in Kenya or Tanzania. The reference to Djibouti in this context was an analytic assessment that Djibouti was a potential target given its US Military presence. A later Djibouti-specific section in the same report focused on a local Somali group and never mentions plot leader Abu Talha al-Sudani or his Somalia-based cell.

- ~~(S~~[redacted]~~/NF)~~ Moreover, the *Study* cites [redacted] information noting that a local Somali group planned to hijack an aircraft and crash it into the base.[150] This threat was later found to be unrelated to the al-Qa'ida plot against Camp Lemonier.[151][152]

15. (U) The Assertion that Detainee Reporting Helped Validate Sources

"~~(TS/~~[redacted]~~NF)~~ The CIA represented to policymakers over several years that information acquired from CIA detainees helped validate CIA sources. CIA records indicate that these CIA representations are based on the CIA's experience with one CIA detainee, Janat Gul. The CIA representations omit key contextual information, including that the CIA subjected Janat Gul to the CIA's enhanced interrogation techniques based on single-source CIA humint reporting that the CIA later concluded was fabricated, and that the CIA officers doubted the credibility of the source prior to Gul's interrogation."

~~(S//OC/NF)~~ CIA frequently cited one particular example of information from a detainee that helped us validate a source because it was the clearest and most consequential case in which what we learned from a detainee interrogation caused us to take steps that revealed the source had fabricated a highly concerning threat. There have been many other occasions when information obtained from detainees has helped us determine how best to use, question, and evaluate the veracity of our sources. We acknowledge that this information was a supplementary benefit to the program, the primary purpose of which was to capture disrupt plots, save lives, and remove senior al-Qa'ida leaders from the battlefield.

~~(TS/~~[redacted]~~/NF)~~ CIA has used reporting from numerous detainees in addition to Janat Gul to vet, task, and corroborate information from countless sources of intelligence. These encompass human sources, other detainees, signals intelligence, and al-Qa'ida's [redacted] communications. We often cited the case of Janat Gul, who was arrested in June 2004 for his facilitation activities on behalf of senior al-Qa'ida leaders, because it was a clear cut example of source validation that resulted from detainee information regarding an important alleged threat. The *Study* incorrectly implies that our use of this example was disingenuous because we already had doubts about the credibility of the source's report. The source told us that he met Janat Gul in 2004 and acquired information on plans for a high-profile attack to occur in the United States before the US Presidential elections.

- ~~(TS/~~[redacted]~~/NF)~~ Although some officers raised questions about this information—as often occurs, especially with sensational intelligence—CIA wrote numerous finished intelligence products citing the information before learning it was fabricated, indicating that CIA took it seriously even as we worked to resolve the inconsistencies.[153][154][155][156]

- ~~(TS/~~[redacted]~~/NF)~~ A body of intelligence reporting contributed to the plausibility of the information. Other sources were reporting on al-Qa'ida attack preparations, and Hassan Gul told CIA interrogators in January 2004 about al-Qa'ida's compartmented external operations training program in Pakistan's tribal areas. At the time of his arrest, CIA believed based on a body of intelligence that Gul facilitated for al-Qa'ida's senior-most leaders, placing him in a position to know details of the group's operational plans. Moreover, CIA had corroborated other aspects of the source's reporting. [157][158][159][160][161][162][163][164][165][166][167][168][169][170][171]

- ~~(TS/~~[redacted]~~NF)~~ Janat Gul's claim that the source never met the al-Qa'ida finance chief—who the source said told him about the pre-election threat—was vital to CIA's assessment and handling of the case. CIA officers assessed Gul was cooperating during his interrogations by that time, leading CIA to [redacted] the source on the meeting and the plot, which he ultimately recanted.[172][173]

- ~~(TS/~~[redacted]~~NF)~~ Gul was not the only CIA detainee to help CIA vet the source's information. CIA detainee Sharif al-Masri, who also knew the source and arranged to have [redacted] also provided information that reinforced CIA's decision to [redacted] the source.[174][175]

~~(S/~~[redacted]~~NF)~~ CIA officers routinely use detainee reporting as an integral part of our tradecraft to help validate sources and array against the larger base of all-source reporting on al-Qa'ida's activities, leadership, and locations. For example, CIA in 2005 questioned Abu Faraj al-Libi—after he underwent enhanced interrogation techniques —on his access to Bin Ladin after a sensitive clandestine source, whose access and past reporting were by that time well established, claimed that Abu Faraj told him he was present with Bin Ladin when the leader filmed a video statement that aired in October 2004.

- ~~(S/~~[redacted]~~NF)~~ A CIA cable on 2 August 2005 shows that nearly a year later analysts were struggling to corroborate the information, which was important to understanding Bin Ladin's associates and their access to him. Abu Faraj adamantly denied the claim and later gave information about how he received the videotape from Bin Ladin's courier, which allowed us to assess that the source's information was incorrect.

- ~~(S~~[redacted]~~NF)~~ CIA in 2009 published an Intelligence Assessment titled "Hunting Usama Bin Ladin: What We Have Learned from Senior Al-Qa'ida Detainees (S/NF)," which contains the judgment—ultimately validated by what we learned at his Abbottabad compound—that Bin Ladin probably did not meet face to face even with his most senior lieutenants after he fled Afghanistan, citing the information from Abu Faraj and other information acquired from detainees in CIA custody.[176][177][178][179][180][181][182][183][184][185][186][187][188][189][190][191][192][193][194][195][196]

16. (U) Arrest and Identification of Uzhair and Saifullah Paracha

"~~(S//OC/NF)~~ *The CIA also repeatedly represented that the CIA interrogation program, and/or the CIA's enhanced interrogation techniques, resulted in critical, otherwise unavailable intelligence related to…the arrests of Uzhair and Sayf al-Rahman Paracha. A review of CIA records found [this] representation to be inaccurate."*[197]

~~(TS/~~[redacted]~~NF)~~ CIA continues to assess that Khalid Shaykh Muhammad's (KSM) identification of Pakistani businessman Saifullah Paracha, an al-Qa'ida contact whom KSM was trying to use to smuggle explosives into the United States, was a success resulting from detainee reporting. KSM's information spurred FBI action against Paracha; prompted FBI to question his son, Uzhair; and allowed analysts to focus on the right Saifullah Paracha.

~~(S//OC/NF)~~ Reporting from interrogations of KSM was directly and uniquely responsible for the arrests of Saifullah Paracha and his son Uzhair Paracha, both of whom KSM claimed had agreed to facilitate an al-Qa'ida plan to smuggle explosives into the United States. [198] In a 26 March 2003 cable, the FBI stated that it had taken action with regard to Saifullah and Uzhair based on KSM's debriefing disseminated 25 March.[199][200]

- ~~(S//NF)~~ The FBI immediately watchlisted Saifullah and Uzhair and searched domestic immigration and law enforcement databases for details on their locations and activities. The FBI determined Saifullah was located in Pakistan but was able to arrest Uzhair in New York on 31 March.[201]
- [redacted][206][207][208]

~~(S//OC/NF)~~ The *Study's* finding that CIA possessed sufficient information to identify and detain Saifullah Paracha without reporting from KSM is incorrect. We had fragmentary information suggesting that someone by the name of Saifullah Paracha might be of interest to us as a possible accomplice in an al-Qa'ida overseas financial scheme. However, we did not know which among the many people who have that name around the world to focus upon. We did not know he was involved in a potential attack on the US until KSM told us Saifullah and his son agreed to smuggle explosives into the US. The FBI found the son in New York, in their words, "based on this reporting."

~~(S//OC/NF)~~ The *Study* says that Saifullah Paracha was already "well-known to the IC prior to the capture of KSM,"[209] but the only clear link the *Study* cites between Paracha and terrorist plotting is actually a reference to a different Saifullah Paracha.[210] All other references are either too vague or indirect to have been meaningful without detainee reporting, refer to a nascent investigation of terrorist use of a Paracha-affiliated business to mask financial transfers, or in many cases, also refer to a different Saifullah Paracha.

- ~~(S//OC/NF)~~ The *Study* refers to a Saifullah Paracha who had links to Mir Aimal Kansi, the terrorist who killed two people outside CIA Headquarters in 1993.[211][212][213] However, the Saifullah Paracha KSM reported on was more than 25 years younger and not connected to Mir Aimal Kansi.[214][215]
- ~~(S//OC/NF)~~ The *Study* cites a "link" between Paracha and Abu Zubaydah, because Paracha's name appeared among hundreds of other names in documents confiscated in the Abu Zubaydah raid.

While the CIA passed Paracha's name and information on his ties to a Karachi, Pakistan-based company with a New York office to the FBI,[216] the Bureau did not report any further information of interest concerning Paracha until after KSM's debriefings.[217][218][219][220]

~~(S//OC/NF)~~ The *Study* cites two other pieces of information on Paracha that it claims are representative of reporting available independent of the CIA detention and interrogation program. Neither report was noteworthy without KSM's information.

- ~~(S//OC/NF)~~ One is an indirect connection to Paracha's business in Pakistan that Committee staff found in an undisseminated FBI case file. It was not available to CIA at the time and would not have linked Paracha to an al-Qa'ida operation independent of KSM's information in any case. The other report is [redacted] of Majid Khan before he was rendered [redacted] to US custody, but the report included few details and was disseminated just after KSM provided the information that allowed us to identify Paracha.

17. (U) Critical Intelligence Alerting the CIA to Ja'far al-Tayyar

"~~(S//OC/NF)~~ *The CIA made repeated claims that the use of the CIA's enhanced interrogation techniques resulted in 'key intelligence' from Abu Zubaydah and KSM on an operative named Ja'far al-Tayyar—later identified as Adnan el-Shukrijumah. These CIA representations omit key contextual facts."*

~~(S//OC/NF)~~ CIA continues to assess that information from detainees in CIA custody—specifically Khalid Shaykh Muhammad (KSM) and Abu Zubaydah—that was obtained after they were subjected to enhanced interrogation techniques was important to identifying Ja'far al-Tayyar. We acknowledge there were cases in which we either made a factual error or used imprecise language, but these mistakes were not central to our representations and none invalidates our assessment that detainee reporting provided key intelligence on this important terrorist.

The "key contextual facts" that the *Study* claims CIA omitted are incorrect:

"~~(S//OC/NF)~~ *The Intelligence Community was interested in the Florida-based Adnan al-Shukrijumah prior to the detention of the CIA's first detainee."*

~~(S//OC/NF)~~ The only reference to Shukrijumah in CIA holdings prior to 2003 was a request for traces from FBI and a CIA response that stated, "A search of our Agency's records found no identifiable information on...Adnan Gulshair el-Shukri Jumah."[221] To support its claim, the *Study* cites a US District Court case file—which was not in CIA databases—that mentions Shukrijumah due to his association with a Florida-based extremist.[222]

"~~(S//OC/NF)~~ *Abu Zubaydah provided information on a KSM associate named Ja'far al-Tayyar to FBI agents in May 2002, prior to being subjected to the CIA's enhanced interrogation techniques."*

~~(TS/~~[redacted]~~NF)~~ Abu Zubaydah's information in May 2002 came after being subjected to sleep deprivation. Although sleep deprivation was not officially designated an enhanced technique in 2002, it was classified as such in 2005. This information was an initial step toward identifying the right Ja'far al-Tayyar, but we were not able to do so until KSM provided more detailed reporting.[223][224][225]

~~(S//OC/NF)~~ The *Study* implies that CIA had substantial information on Ja'far al-Tayyar by noting that we produced "a targeting study" on him in January 2003, prior to KSM's detention. However, that study was titled, "Targeting Study: Finding the Right Ja'far al-Tayyar,"[226] and the first paragraph stated, "Unfortunately, many extremists use the name of Ja'far al-Tayyar, which can be translated as 'Jafar the Pilot.' Headquarters research has identified several distinct Ja'far al-Tayyars. We very much want to confirm the locations of each of these Jafars."[227]

"~~(S//OC/NF)~~ *CIA personnel distrusted KSM's reporting on Ja'far al-Tayyar—stating KSM fabricated information and had included al-Tayyar 'into practically every story, each time with a different role.'"*

~~(S//OC/NF)~~ KSM's inconsistencies did not lead CIA officers to discount al-Tayyar's importance. The cited cable, when taken in context says, "We believe this [deception] could indicate that KSM is trying to protect al-Tayyar, and we intend to focus more strongly on [al-Tayyar]."[228] Our focus on al-Tayyar over the years—particularly when coupled with detainee reporting and documents seized at Bin Ladin's compound in Abbottabad—has helped us better understand his important role in al-Qa'ida's terror operations and his involvement in several unrealized plots.[229][230][231][232]

"~~(S//OC/NF)~~ *Other CIA detainee reporting differed from KSM's reporting."*

~~(S//OC/NF)~~ Discrepancies between KSM and other detainee accounts of al-Tayyar, who is one of al-Qa'ida's most security-conscious and reclusive operatives,[233] were to be expected from detainees with varying degrees of access to him. Furthermore, the *Study's* basis for this criticism consists of two personal emails, a single detainee report, and an NCTC product from its "Red Team," which is charged with providing analysis that is contrary to widely held analytic positions. Terrorism analysts are trained to question their judgments and to openly express disagreement, especially when there is conflicting information. However, there has always been a strong interest in al-Tayyar, and there is consensus that he has become a leading figure in al-Qa'ida's external operations.

"~~(S//OC/NF)~~ CIA records indicate that KSM did not know al-Tayar's true name and that it was Jose Padilla—in military custody and questioned by the FBI—who provided al-Tayar's true name as Adnan el-Shukrijumah."

~~(S//OC/NF)~~ While KSM did not know al-Tayyar's true name, his biographic description was sufficient for FBI to identify Adnan el-Shukrijumah as a likely candidate. In addition, the FBI knew to ask Padilla about al-Tayyar's true name because KSM told CIA debriefers that he would know it.

~~(S//OC/NF)~~ In reviewing this case, we did identify occasions when CIA's language either was not as precise as it should have been or we made factual errors.

- ~~(S//OC/NF)~~ Sometimes we said KSM called al-Tayyar the "next Muhammad Atta." This was an imprecise paraphrase of KSM, who actually described al-Tayyar as having similar education and Western experience as Muhammad Atta and considered him as the "next emir" for an attack in the United States. KSM did not call al-Tayyar "the next Muhammad Atta."
- ~~(S//OC/NF)~~ In some of the early representations, we incorrectly stated al-Tayyar fled the United States in response to the FBI investigation, although he had in fact already departed the United States by this time.

18. ~~(S//NF)~~ The Identification and Arrest of Salih al-Marri

"~~(S//OC/NF)~~ The CIA repeatedly represented that the CIA interrogation program, and/or the CIA's enhanced interrogation techniques, resulted in critical, otherwise unavailable intelligence, related to...the arrest of Salih al-Marri."

"~~(S//OC/NF)~~ Reporting from KSM as a result of the lawful use of EITs played no role in the arrest of Salih al-Marri."

~~(S//OC/NF)~~ CIA mistakenly provided incorrect information to the Inspector General (IG) that led to a one-time misrepresentation of this case in the IG's 2004 *Special Review*. This mistake was not, as it is characterized in the "Findings and Conclusions" section of the *Study*, a "repeatedly represented" or "frequently cited" example of the effectiveness of CIA's interrogation program. We are unable to identify other cases in which we link al-Marri's arrest to CIA detainee reporting.

~~(S/~~[redacted]~~NF)~~ With respect to the merits of this case, however, we would note that reporting from Khalid Shaykh Muhammad (KSM) was responsible for clarifying the role that al-Marri—on whom we previously had no concrete information—played for al-Qa'ida as a sleeper operative in the US.

- ~~(S/~~[redacted]~~/NF)~~ Prior to KSM's detention on 1 March 2003, CIA and FBI were aware of al-Marri's links to al-Qa'ida and strongly suspected him of having a nefarious objective[234] in the Peoria, Illinois area near the time the FBI arrested him in December 2001. Both agencies, however, lacked detailed reporting to confirm these suspicions or more fully understand al-Marri's specific role for al-Qa'ida until KSM discussed him. [235][236][237]

- ~~(S/~~[redacted]~~NF)~~ KSM during CIA debriefings in March 2003 identified a photograph of al-Marri as an individual whom he had ordered to travel to the US as a sleeper operative shortly before the 9/11 attacks.[238] KSM claimed that he intended for al-Marri to help other al-Qa'ida operatives in the US prior to unspecified follow-on operations, to explore the possibility of hacking into US banks, and to receive funds for the 9/11 hijackers—all of which put into context the fragmentary information previously available.

19. ~~(S//NF)~~ The Collection of Critical Tactical Intelligence on Shkai, Pakistan

"~~(TS/~~[redacted]~~NF)~~ The CIA represented to policymakers over several years that 'key intelligence' was obtained from the use of the CIA's enhanced interrogation techniques that revealed Shkai, Pakistan to be 'a major al-Qa'ida hub in the tribal areas,' and resulted in 'tactical intelligence [redacted] *Shkai, Pakistan.' These CIA representations are based on the CIA's experience with one CIA detainee, Hassan Ghul* [sic]. *While CIA records indicate that Hassan Ghul did provide information on Shkai, Pakistan, a review of CIA records also found that (1) this information was provided prior to Hassan Ghul being subjected to CIA interrogation techniques; and (2) the CIA assessed that information provided by Ghul confirmed earlier reporting that the Shkai valley of Pakistan served as al-Qa'ida's command and control center after the group's 2001 exodus from Afghanistan."*

~~(S//OC/NF)~~ CIA correctly reported that senior al-Qa'ida facilitator Hassan Gul's information about a small town in Pakistan's tribal areas called Shkai was critical, [redacted] We never represented that Shkai was previously unknown to us or that Gul only told us about it after he was subjected to enhanced interrogation techniques . We said that after these techniques were used, Gul provided "detailed tactical intelligence." That intelligence differed significantly in granularity and operational [redacted] from what he provided before enhanced techniques. As a result of his information, we were able to make a persuasive case [redacted]

~~(TS/~~[redacted]~~NF)~~ CIA continues to assess that the information derived from Hassan Gul after the commencement of enhanced techniques provided new and unique insight into al-Qa'ida's presence and operations in Shkai, Pakistan.[239] Before Gul's capture in January 2004, sources of varying credibility gave general information about the town's importance as an emerging al-Qa'ida safehaven, but Gul's debriefings were the most definitive first-hand account of the identities, precise locations, and activities of senior al-Qa'ida members in Shkai at that time.[240] As a result of the information Gul provided, [redacted]

~~(TS/~~[redacted]~~NF)~~ As the *Study* notes, Gul showed signs of cooperation immediately following his capture; before undergoing enhanced techniques, he did give us some detail about the activities and general whereabouts of al-Qa'ida members in Shkai. Nonetheless, interrogators judged that he was not yet cooperative enough to be debriefed by subject matter experts and requested the use of enhanced techniques.[241] After being subjected to enhanced techniques, he provided more granular information when, for example, he sat down with [redacted] experts and pointed to specific locations where he met some of the senior al-Qa'ida members we were trying to find. The intelligence derived from Gul's debriefings yielded information that continues to undergird our analysis of al-Qa'ida's activities in Pakistan's tribal areas.

- ~~(TS~~[redacted]~~/NF)~~ Gul revealed his understanding that then little-known al-Qa'ida operative Hamza Rabi'a had taken over as the group's lead attack coordinator after 9/11 mastermind Khalid Shaykh Muhammad's capture in 2003, and was using facilities in Shkai to train operatives for attacks outside Pakistan.[242] He also used [redacted] to pinpoint a Shkai residence where he claimed to have met senior al-Qa'ida leader 'Abd al-Hadi al-Iraqi. He said the facility was called the "Bachelor House" and that several unmarried men associated with al-Qa'ida lived there, [redacted][243]

- ~~(TS~~[redacted]~~NF)~~ Gul also used [redacted] to give more details about the Bachelor House, another facility owned by a local al-Qa'ida supporter dubbed "The Ida Khan Complex," and a separate compound used by a group of al-Qa'ida-aligned Uzbeks. He also described the group's evacuation plans in the event of Pakistani military operations.[244]

- ~~(TS/~~[redacted]~~NF)~~ The granularity of Gul's information—coupled with [redacted] significantly bolstered CIA analysts' confidence about al-Qa'ida's disposition in the region, and revealed how the group was using Shkai as a venue to plot attacks against the West, including possible US interests.[245]

~~(TS/~~[redacted]~~NF)~~ Senior US officials during the winter and spring of 2004 presented the Agency's analysis of Gul's debriefings and other intelligence about Shkai [redacted]

- ~~(TS/~~[redacted]~~NF)~~ CIA Headquarters in February 2004 sent a cable to [redacted] titled *Eyes Only: Transmittal of Shkai Pre-brief Package for DCI Meeting with* [redacted] which outlined how CIA's analysis of [redacted] and detainee reporting—including Gul's—crystallized the Agency's understanding of al-Qa'ida's robust operational hub in Shkai.[247]

- ~~(TS/~~[redacted]~~NF)~~ Days later, CIA Headquarters sent [redacted] a cable for passage to [redacted] offering the Agency's latest assessment of Shkai. The cable explicitly cited Gul as the source of the information, and included a comprehensive list—including [redacted] of buildings, compounds, and other facilities tied to the group in Shkai.[248][249][250][251]

20. (U) Information on the Courier that Led to the UBL Operation

"~~(S//OC/NF)~~ A review of CIA records found that much of the critical intelligence on Abu Ahmed [sic] al-Kuwaiti was acquired prior to—and independently of—the CIA detention and interrogation program."

~~(S//OC/NF)~~ CIA correctly represented that detainee reporting helped us identify Usama Bin Ladin's courier, Abu Ahmad al-Kuwaiti. The *Study* incorrectly characterizes the intelligence we had on Abu Ahmad before acquiring information on him from detainees in CIA custody as "critical." That intelligence was insufficient to distinguish Abu Ahmad from many other Bin Ladin associates until additional information from detainees put it into context and allowed us to better understand his true role and potential in the hunt for Bin Ladin.

~~(S//OC/NF)~~ Information from detainees in CIA custody on Abu Ahmad's involvement in delivering messages from Bin Ladin beginning in mid-2002 fundamentally changed our assessment of his potential importance to our hunt for Bin Ladin. That information prompted us to question other detainees on his role and identity and to review previous reporting. CIA combined this information with reporting from detainees [redacted] signals intelligence, and reporting from clandestine sources to build a profile of Abu Ahmad's experiences, family, and characteristics that allowed us to eventually determine his true name and location. The other intelligence that the *Study* characterizes as "critical" did not distinguish Abu Ahmad from others who had some level of access to Bin Ladin, especially before 9/11.

~~(TS~~[redacted]~~NF)~~ Detainees in CIA custody Ammar al-Baluchi and Hassan Gul offered vital insights into Abu Ahmad's role.

- ~~(S//OC/NF)~~ Ammar, after undergoing enhanced interrogation techniques, was the first detainee to reveal what apparently was a carefully guarded al-Qa'ida secret—that Abu Ahmad served as a courier for messages to and from Bin Ladin.[252] Before that, we had only general information [redacted] that Abu Ahmad had interacted with Bin Ladin before the group's retreat from Tora Bora, Afghanistan in late 2001, when Bin Ladin was relatively accessible to a number of al-Qa'ida figures.
- ~~(TS~~[redacted]~~NF)~~ Gul, while in CIA custody—before undergoing enhanced techniques—speculated that Abu Ahmad could be one of three people with Bin Ladin and speculated that Abu Ahmad may have handled Bin Ladin's needs, including sending messages to his gatekeeper, Abu Faraj al-Libi.[253]
- ~~(TS~~[redacted]~~NF)~~ After undergoing enhanced techniques, Gul stated that Abu Ahmad specifically passed a letter from Bin Ladin to Abu Faraj in late 2003 and that Abu Ahmad had "disappeared" from Karachi, Pakistan in 2002. This information was not only more concrete and less speculative, it also corroborated information from Ammar that Khalid Shaykh Muhammad (KSM) was lying when he claimed Abu Ahmad left al-Qa'ida in 2002.

~~(S//OC/NF)~~ Even after undergoing enhanced techniques, KSM lied about Abu Ahmad, and Abu Faraj denied knowing him.[254][255][256] A cable in the aftermath of Abu Faraj's debriefing[257] indicates that this dissembling immediately raised our suspicions, and it would eventually strengthen our assessment that Abu Ahmad was an important potential inroad to Bin Ladin, which is reflected in analytic products and targeting cables beginning in 2007.[258]

- ~~(TS/~~[redacted]~~OC/NF)~~ Ammar and Gul both said Abu Ahmad worked directly for Abu Faraj as of mid-2002.[259][260]

- ~~(TS/~~[redacted]~~NF)~~ KSM denied that Abu Ahmad delivered letters from Bin Ladin and claimed that Abu Ahmad left al-Qa'ida in 2002.[261] Ammar, however, claimed KSM had told him that Abu Ahmad continued to deliver letters from Bin Ladin after 2002—a point that Gul corroborated.[262]

~~(S//OC/NF)~~ Detainees in CIA custody helped confirm Abu Ahmad's true identity. We first obtained a partial true name for Abu Ahmad from a detainee [redacted] but that detainee claimed Abu Ahmad died in 2001.[263] CIA later discovered through signals intelligence, a clandestine source, and other detainees—in CIA [redacted] custody—that the [redacted] detainee had confused Abu Ahmad with his deceased brother. Once we learned that Abu Ahmad was most likely alive, we were able to use the partial true name to acquire additional information [redacted] Detainees in CIA custody provided additional pieces of the puzzle.

- ~~(TS/~~[redacted]~~NF)~~ Detainee Abu Yasir al-Jazari told CIA interrogators that Abu Ahmad mixed "Pakistani words" with Arabic. A native Arabic and Pashtu speaker, [redacted]—[redacted] [redacted]—spoke with a speech impediment that made it sound as if he were mixing the two languages, [redacted] This information helped CIA [redacted] assess that the [redacted] living at the compound in Abbottabad was Abu Ahmad.[264][265]

- ~~(TS/~~[redacted]~~NF)~~ Ahmad Ghailani during a CIA interrogation said that Abu Ahmad's first child was a daughter born around 2002, which matched information from [redacted] about individuals at the Abbottabad compound.[266]

~~(S//OC/NF)~~ Insights from detainees in CIA custody into Bin Ladin's security practices and family increased CIA's confidence that Bin Ladin could be residing at the compound in Abbottabad.

- ~~(S//OC/NF)~~ Khallad Bin Attash and other detainees in CIA custody[267] confirmed Bin Ladin after fleeing Afghanistan would not meet face-to-face with al-Qa'ida members, had few bodyguards, relied on a small group of individuals native to the area to carry messages and handle daily chores, would not leave the house, and did not relocate frequently—all of which matched circumstances at the compound.[268][269][270][271][272][273][274][275]

- ~~(TS/~~[redacted]~~NF)~~ Sharif al-Masri and KSM speculated during CIA interrogations that Bin Ladin's youngest wife, Amal, probably was with Bin Ladin,[276][277][278][279][280] and Sharif indicated he passed a letter intended for another Bin Ladin wife, Siham, along with a letter for Bin Ladin to Abu Faraj, suggesting they were at least near each other. These observations helped [redacted] identify family members at the Abbottabad compound.

~~(S//OC/NF)~~ CIA has never represented that information acquired through its interrogations of detainees was either the first or the only information that we had on Abu Ahmad. We have reported—and continue to assess—that the information we acquired from them significantly advanced our understanding of Abu Ahmad beyond the other intelligence cited in the *Study*.

- ~~(S/~~[redacted]~~NF)~~ Zubair al-Ha'ili's comment [redacted] interrogators in 2002 that Abu Ahmad was one of several "close associates of Usama Bin Ladin," was not sufficient to distinguish Abu Ahmad from many other al-Qa'ida members who knew Bin Ladin at the time. Similarly, we assess Riyadh the

Facilitator's claim that Abu Ahmad traveled to meet Bin Ladin refers to a meeting before 11 September 2001, when numerous al-Qa'ida members had access to Bin Ladin.

- ~~(S//OC/NF)~~ Abu Ahmad's interactions with Bin Ladin's son Sa'ad—which the *Study* suggests were another "critical" piece of intelligence—were not unusual because Sa'ad worked under KSM as a facilitator; he also relied on KSM to send messages to his father. Similarly, Abu Ahmad's involvement in operational planning with KSM did not suggest that he was facilitating for Bin Ladin.

- ~~(TS/~~[redacted]~~NF)~~ Abu Ahmad in 2002 stopped using the phone number and the email address the *Study* cites as "critical" information in our possession. The IC has never linked the phone number to any of Bin Ladin's known locations in Peshawar, Swat/Shangla, Haripur or Abbottabad, nor linked the email account to any of Abu Ahmad's communications after 2002.

~~(TS/~~[redacted]~~NF)~~ It is impossible to know in hindsight whether we could have obtained from Ammar, Gul, and others the same information that helped us find Bin Ladin without using enhanced techniques, or whether we eventually would have acquired other intelligence that allowed us to successfully pursue the Abu Ahmad lead or some other lead without the information we acquired from detainees in CIA custody. However, the information we did obtain from these detainees played a role—in combination with other important streams of intelligence—in finding the al-Qa'ida leader.

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[1] [CIA | [redacted]10972 | | 12 April 2002 | | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[2] [CIA | [redacted]10976 | | 12 April 2002 | | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[3] [Other | SSCI Report, Volume 2, Part 1, Page 382 | | 13 Dec 2012 | | | | | ~~(TS/~~[redacted]~~NF)~~ |]

[4] [CIA | [redacted]10976 | | 12 April 2002 | | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[5] [CIA | ALEC[redacted] | 22 Apr 2002 | | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[6] [CIA | [redacted]11036 | | 22 Apr 2002 | | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[7] [CIA[redacted] | | | | ~~(S//NF)~~ |]

[8] [CIA | [redacted]11058 | | 23 Apr 2002 | | | | | ~~(S~~[redacted]~~NF)~~ |]

[9] [CIA | [redacted]78390 | | 25 Apr 2002 | | | | | ~~(S~~[redacted]~~NF)~~ |]

[10] [CIA | [redacted]11070 | | 25 April 2002 | | | | | ~~(S~~[redacted]~~NF)~~ |]

[11] [CIA | ALEC[redacted] | | | | | ~~(S~~[redacted]~~/NF)~~ |]

[12] [Other | SSCI Report, Volume 2, Part 1, Pages 376 | | 13 Dec 2012 | | | | | ~~(TS~~[redacted]~~NF)~~ |]

[13] [Other | SSCI Report, Volume 2, Part 1, P. 395, Citation 1867 | | 13 December 2012 | | | | | ~~(TS~~[redacted]~~NF)~~ | The citation refers to two documents, the first being a Department of Justice summary of chronology on Jose Padilla. This document (on page 2, paragraph 3), cites Padilla's "Mujahideen Identification Form" as having been "recovered by FBI in Pakistan in a box of documents containing approximately 180 such applications." This identification form, as cited in FBI WASH 101514Z, item 4, as a "pledge sheet" was acquired by LEGAT[redacted] on 15 December 2001, as the SSCI Report cites. It does not say how FBI acquired these documents, but states they were originally collected in a raid on 8 December 2001 at "an Arab office (NFI) Kandahar." We have been unable to locate any records of this document entering CIA possession. Reports at this time also were often stored in CIA facilities, because they were secure, but FBI maintained possession of them to preserve chain of custody for use in legal cases. This may have applied to this document. The *Study* then cites a July 2007 personal email from a CIA officer describing a meeting with an FBI officer recalling the raids over five years later. The FBI officer mistakenly recollected that the pledge sheet was collected during the 24 November 2001 raid against Salim Ahmad Salim Hamdan. This raid was against two vehicles, not an Arab office. Documents in this raid were disseminated by[redacted] before passing them to FBI, but there is no record of Padilla's pledge sheet appearing in this documentation. The FBI officer's confusion over which raid the specific document came from probably explains why the SSCI Report claimed the document was "obtained in Afghanistan by the CIA." CIA has no record of having possession of this document between its 8 December 2001 recovery by the US military and its 15 December 2001 acquisition by the FBI.]

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[14] [CIA | ALEC [redacted] | ADDITIONAL INFORMATION ON THREATS TO US INTERESTS IN KARACHI [redacted] | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[15] [CIA | [redacted]45028 | | [redacted] | [redacted] | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[16] [CIA | [redacted]14420 | | [redacted] | [redacted] - 11 May Ammar al-Baluchi Interviews | | ~~(S//OC/NF)~~ | ~~(S//OC/NF)~~ |]

[17] [CIA | [redacted]38403 | | 05/17/2003 | | COMMENTS BY AMMAR AL-BALUCHI ON PLANS FOR SIMULTANEOUS ATTACKS IN KARACHI, PAKISTAN IN LATE MAY OR EARLY JUNE | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[18] [CIA | [redacted]14291 | [redacted] | 2 MAY 2003 AMMAR AL-BALUCHI INTERVIEW | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[19] [CIA | [redacted]38558 | | 19 May 2003 | | [redacted]Ammar 17 May Interrogation | | ~~(S//OC/NF)~~ | ~~(S//OC/NF)~~ |]

[20] [CIA | [redacted]38405 | | 05/17/2003 | | COMMENTS BY WALID MUHAMMAD SALEH BIN ATTASH ON AL-QA'IDA'S OPERATIONAL PLANS AGAINST WESTERN INTERESTS IN KARACHI | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[21] [CIA | [redacted]38405 | | 05/17/2003 | | COMMENTS BY WALID MUHAMMAD SALEH BIN ATTASH ON AL-QA'IDA'S OPERATIONAL PLANS AGAINST WESTERN INTERESTS IN KARACHI | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[22] [CIA | [redacted]13072 | | 12/11/2002 | | [redacted]

[23] [CIA | [redacted]11448 | | 04/30/2003 | | KHALID SHAYKH MUHAMMAD'S COMMENTS ON AL-QA'IDA THREATS TO US INTERESTS IN KARACHI | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[24] [CIA | [redacted]11455 | | 04/30/2003 | | [redacted] 30 APRIL 2003 INTERROGATION OF KHALID SHAYKH MUHAMMAD | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[25] [CIA | [redacted]34513 | | 03/05/2003 | | | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[26] [CIA | [redacted]34575 | [redacted]INTERROGATION OF KHALID SHAYKH MUHAMMAD | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[27] KSM also explained that the letter authorized Hamza al-Zubayr-who died in the raid on 11 September 2002-to conduct attacks against two Karachi hotels, and KSM requested Zubayr time the attacks to coincide with a third operation being planned by an al-Qa'ida-aligned Pakistani militant group.

[28] [CIA | [redacted]38405 | | 05/17/2003 | | COMMENTS BY WALID MUHAMMAD SALEH BIN ATTASH ON AL-QA'IDA'S OPERATIONAL PLANS AGAINST WESTERN INTERESTS IN KARACHI | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[29] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

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[30] [CIA | ALEC [redacted] | | | | | ~~(S~~[redacted]~~NF)~~ |]

[31] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[32] [CIA |[redacted]45325 | | 051611Z SEP 03 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[33] [CIA [redacted] ~~(S/~~[redacted]~~NF)~~]

[34] [CIA [redacted] ~~(S~~[redacted]~~NF)~~]

[35] [CIA [redacted] ~~(S/~~[redacted]~~NF)~~]

[36] [CIA |[redacted]45976 | | 151921Z SEP 03 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[37] [CIA |[redacted]15711 | | 300722Z SEP 03 | 300722Z SEP 03 | | | | ~~(S~~[redacted]~~NF)~~ |]

[38] [CIA [redacted]15608 | [redacted] | | | | ~~(S~~[redacted]~~NF)~~ |]

[39] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[40] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted] ~~NF)~~ |]

[41] [CIA | Report, Volume 2, page 464, 450 | | 2012 | | | | | ~~(TS~~[redacted]~~/NF)~~ |]

[42] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[43] [Other | Report, Volume 2, Part 1, Page 498 | | 13 December 2012 | | | | | ~~(TS~~[redacted]~~NF)~~ |]

[44] [CIA |[redacted]80508 | [redacted] | | | | ~~(S~~[redacted]~~NF)~~ |]

[45] [CIA [redacted] | | | | ~~(S~~[redacted]~~NF)~~ |]

[46] [CIA [redacted] | | | | ~~(S~~[redacted]~~NF)~~ |]

[47] [CIA [redacted] | | | | ~~(S~~[redacted]~~NF)~~ |]

[48] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[49] [Other | Report, Volume 2, Footnotes 2273 and 2277 | | 13 December 2012 | | | | | ~~(TS~~[redacted]~~NF)~~ |]

[50] [FBI | FBI WASH 280438Z | | 3 May 2003 | | | | | ~~(S//OC/NF)~~ |]

[51] [Other | Report, Volume 2, Part 1, Page 500 | | 13 December 2012 | | | | | ~~(TS~~[redacted]~~NF)~~ |]

[52] [CIA | ALEC [redacted] | 5 June 2003 | | | | | ~~(TS~~[redacted]~~/NF)~~ |]

[53] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[54] [CIA [redacted] | | | | ~~(S~~[redacted]~~NF)~~ |]

[55] [CIA [redacted] | | | | ~~(S//NF)~~ |]

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[56] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[57] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[58] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[59] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[60] [CIA [redacted]| | | | | ~~(S/~~[redacted]~~NF)~~ |]

[61] [CIA [redacted] | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[62] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[63] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[64] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[65] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[66] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[67] [redacted]

[68] [redacted]

[69] [redacted]

[70] [redacted]

[71] [redacted]

[72] [redacted]

[73] [Other | SSCI Report Volume 2, Part 2, Page 600 | | 13 Dec 2012 | | | | | ~~(TS/~~[redacted]~~NF)~~ |]

[74] [CIA | ALEC[redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[75] [FBI | FBI WASH 092137Z | | 9 March 2003 | | | | | ~~(S//OC/NF)~~ |]

[76] [FBI | FBI WASH 190653Z | | 19 March 2003 | | | | | ~~(S//OC/NF)~~ |]

[77] [CIA |[redacted]13758 | [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[78] [CIA |[redacted]13765 | [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[79] [CIA |[redacted]13785 | [redacted] | | | | ~~(S~~[redacted]~~NF)~~ |]

[80] [CIA | ALEC [redacted] | 18 Mar 2003 | | | | | ~~(S~~[redacted]~~NF)~~ |]

[81] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[82] [CIA [redacted]13826 | | 19 Mar 2003 | | | | | ~~(S~~[redacted]~~NF)~~ |]

[83] [FBI | FBI WASH 040537Z | | 4 Apr 2003 | | | | | ~~(S//OC/NF)~~ |]

[84] [Other | SSCI Report Volume 2, Part 2, Page 605 | | 13 Dec 2012 | | | | | ~~(TS/~~[redacted]~~NF)~~ |]

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[85] [CIA | ALEC[redacted] | 6 March 2003 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[86] The source the *Study* cites containing this statement was an internal CIA sitrep compiled daily by 4:30pm at the time for counterterrorism seniors at CIA; the reference to the Reid investigation came on page 10 of 15 pages of updates that day and must have come via some informal communication from FBI that was not otherwise documented.

[87] The *Study* references FBI WASHINGTON DC130555Z dated 13 July 2002 and FBI WASHINGTON DC152151Z dated 16 July 2002. The only other relevant communication was FBI WASHINGTON DC281958Z dated 29 August 2002, which was a follow-on to the others and indicated in relevant part that Belgian authorities "contacted the Leicester Constabulary in the UK [about Badad Sajid] and were told by officers in the Constabulary that Sajid was out of the country (NFI)."

[88] CIA advised FBI that the SajidBadat with whom Sajid might be identifiable was from Gloucester England, and his name and date-of-birth had appeared on a list of 68 persons characterized as "suspected of involvement in terrorist financing" provided[redacted]in October 2001. Otherwise there were no further references to Badat's name or variants thereof in CIA reporting until August 2003,[redacted]

[89] [CIA[redacted] | ~~(S//NF)~~ | ~~(S//NF)~~ |]

[90] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[91] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[92] KSM initially reported Reid's partner's alias as "Talha," not Issa, when he provided his shoe bomb narrative on 20 March 2003. KSM later corrected himself on 11 May 2003 and confirmed the operative's alias was in fact Issa. We note that KSM's correction came soon after the arrest of his nephew, Ammar al-Baluchi, on 29 April 2003, and assess KSM may have corrected this information knowing that Ammar had communicated with Issa on KSM's behalf and could refute KSM's initial claim that he went by the name Talha. This change was reflected in a reissue of the intelligence report,[redacted]

[93] [CIA[redacted] | 314/15752-03 | | ~~(S//NF)~~ | ~~(S//NF)~~ |]

[94] [CIA[redacted] | 315/31329-03 | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[95] The provision of this photograph[redacted] dated 03 September 2003. KSM's identification was reported in[redacted]12806 dated 10 September 2003 and highlighted in Alec[redacted]

[96] [CIA [redacted]| | ~~(S//OC-NF)~~ | ~~(S//OC-NF)~~ |]

[97] See CIA's response to the SSCI report's finding on Issa al-Hindi for further details on the essential role information from detainees in CIA custody played in sparking efforts to identify, track, capture,[redacted]Abu Talha al-Pakistani.

[98] See[redacted]and[redacted]

[99] [CIA [redacted]13678 | |[redacted]| | | | | ~~(S/~~[redacted]~~NF)~~ |]

[100] [CIA[redacted] | ~~(S//NF)~~ | ~~(S//NF)~~ |]

[101] [CIA [redacted]81697 | [redacted] | | | | ~~(S//NF)~~ |]

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[102] [CIA [redacted] | 315/35476-03 | | ~~(S~~[redacted]~~/NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[103] [CIA [redacted] | 315/41022-03 | | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

[104] [redacted]

[105] [CIA [redacted] 40915 | [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[106] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~/NF)~~ |]

[107] [CIA [redacted] | ~~(S/~~[redacted]~~/NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[108] [redacted]

[109] [CIA | DIRR[redacted] | [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~/NF)~~ |]

[110] [CIA | DIRR[redacted] | [redacted] AND KHALID SHAYKH MOHAMMAD | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[111] [CIA | DIRR[redacted] [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[112] [CIA | ALEC [redacted] | | | | ~~(S~~[redacted]~~/NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[113] [CIA [redacted]64626 | | 13 September 2001 | | NAMES OF THREE KABUL BASED USAMA BIN LADIN ASSOCIATES RESPONSIBLE FOR THE 11 SEPTEMBER ATTACKS IN THE UNITED STATES | | ~~(TS~~[redacted]~~NF)~~ | ~~(TS/~~[redacted]~~NF)~~ |]

[114] [CIA |[redacted]16218 | [redacted] | BACKGROUND INFORMATION ON THE 11 SEPTEMBER ATTACKS, THE BOMBING OF THE US EMBASSY NAIROBI AND THE ATTACK ON THE USS COLE; SENIOR AL-QA'IDA LIEUTENANT STATES A PREVIOUSLY PLANNED OPERATION LARGER THAN THE SEPTEMBER 11 ATTACKS WOULD BE EXECUTED AGAINST THE UNITED STATES | | ~~(TS/~~[redacted]~~NF)~~ | ~~(TS~~[redacted]~~NF)~~ |]

[115] For example, we also had reporting that Abu Zubaydah and other al-Qa'ida associates were in touch with a Mukhtar in Saudi ARabi'a, and another in Qatar in early 2001.

[116] [CIA | WASHINGT[redacted] | | BACKGROUND INFORMATION ON MAHFOUD OULD EL WALID AKA ABU HAFS THE MAURITANIAN | | ~~(TS/~~[redacted]~~NF)~~ | ~~(TS/~~[redacted]~~NF)~~ |]

[117] [redacted]

[118] [CIA [redacted]12249 | | 09/09/2002 | | HASSAN GUL - TIGHTENING THE NOOSE | | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

[119] [CIA [redacted] | TERRORISM: ADDITIONAL DETAILS OF KARACHI-BASED AL-QA'IDA OPERATIVE HASSAN GUL | | ~~(S~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

[120] [CIA | ALEC[redacted] | 08/29/2002 | | ABU ZUBAYDAH INFORMATION ON LEADS TO POSSIBLE LOCATIONS OF SAYF AL-'ADL AND SHAYKH BIN LADIN | | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

[121] [CIA [redacted]12207 | | 09/05/2002 | [redacted]

[122] [CIA |[redacted]12207 | | 09/05/2002 | [redacted]

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[123] [CIA |[redacted]12267 | | 09/11/2002 | | COUNTERTERRORIST OPERATIONS IN KARACHI ON 11 SEPTEMBER; TAKEDOWN OF THREE TERRORIST SAFEHOUSES; CAPTURE OF 10 AL-QA'IDA ASSOCIATED EXTREMISTS INCLUDING UMAIR AL-GHARIB AND RAMZI BIN AL-SIB (HIGH PROBABILITY) | | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

[124] [CIA [redacted]

[125] [CIA [redacted]20790 | | 21 September 2002 | | BINALSHIBH DEBRIEFINGS: RAMZI PROVIDES NEW INFORMATION ON MUKHTAR AND ADMITS HE LIED TO US INTERROGATORS | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[126] [CIA |[redacted]20823 | | 25 September 2002 | 24 September 2002 | RAMZI BINALSHIBH IDENTIFICATION OF AMAR | | ~~(S/~~[redacted]~~/NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[127] [CIA | ALEC[redacted] | 09/30/2002 | | IDENTIFYING AMMAR | | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[128] [CIA | ALEC[redacted] | 09/30/2002 | | IDENTIFYING AMMAR | | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[129] [CIA | ALEC[redacted] | FURTHER IDENTIFICATION OF AMMAR | | | ~~(S/~~[redacted]~~NF)~~ |]

[130] [CIA [redacted]

[131] [CIA [redacted]

[132] [CIA [redacted]

[133] [CIA [redacted]

[134] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[135] [CIA [redacted]41714 | | 6 March 2003 | | | | | ~~(S~~[redacted]~~NF)~~ |]

[136] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[137] [CIA [redacted]71107 | | 13 April 2004 | | | | | ~~(S~~[redacted]~~/NF)~~ |]

[138] [CIA [redacted]71932 | | 14 May 2004 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[139] [CIA [redacted]231804 | | 14 May 2004 | | | | | ~~(TS/~~[redacted]~~NF)~~ |]

[140] [CIA | WASHINGTON[redacted] | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[141] [CIA | ALEC[redacted] | | | | | ~~(S~~[redacted]~~/NF)~~ |]

[142] [CIA [redacted]14366 | | 20040624 | | | | | ~~(S~~[redacted]~~NF)~~ |]

[143] [CIA | ALEC[redacted] | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[144] [CIA [redacted]14366 | | 20040624 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[145] [CIA [redacted]2587 | | 24 August 2009 | | | | | ~~(TS~~[redacted]~~/NF)~~ |]

[146] [CIA [redacted]1530 | GUIDE ID: 1012/2rcfvv | 7 September 2006 | | | | | ~~(TS~~[redacted]~~/NF)~~ |]

[147] [Other | Report - Volume 2, Part 2, P. 925 | | 13 Dec 2012 | | | | | ~~(S~~[redacted]~~NF)~~ |]

[148] [CIA [redacted] | | | | ~~(S//NF)~~ |]

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[149] [CIA | WASHINGT[redacted] | | | | ~~(TS/~~[redacted]~~NF)~~ | |]

[150] [CIA [redacted] | | | | ~~(S//NF)~~ | |]

[151] [CIA [redacted] | | | | ~~(S/~~[redacted]~~/NF)~~ | |]

[152] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ | |]

[153] [CIA | CTC 2004-30098HC | | 6 August 2004 | | The Homeland Plot: What We Still Need to Learn | | ~~(TS~~[redacted]~~NF)~~ | ~~(TS~~[redacted]~~NF)~~ | |]

[154] [CIA | CTC 2004-30064H | GUIDE ID: 1012/41rb1j | 12 July 2004 | | Al-Qa'ida Aiming for Homeland Strike Ahead of US Election: The Origins of the Plot | | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[155] [CIA | CTC 2004-3011H | | 15 September 2004 | | Time is Running Out to Stop Al-Qa'ida's Attack on the Homeland | | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[156] [CIA | CTC 2005-30001H | GUIDE ID: 1012/6shg | 8 January 2005 | | Al-Qa'ida's Efforts Against the US Homeland: Persistent and Resilient | | ~~(TS~~[redacted]~~NF)~~ | ~~(TS~~[redacted]~~NF)~~ | |]

[157] [CIA |[redacted]03023 | [redacted] | PLANS TO STRIKE THE UNITED STATES | | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ | |]

[158] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[159] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[160] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[161] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~/NF)~~ | |]

[162] [CIA [redacted] | ~~(S/~~[redacted]~~/NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[163] [CIA [redacted] | ~~(S//NF)~~ | ~~(S//NF)~~ | |]

[164] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[165] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[166] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[167] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[168] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

[169] [CIA [redacted] | ~~(S//NF)~~ | ~~(S//NF)~~ | |]

[170] [CIA [redacted]4267 | | 170646Z SEP 04 | |[redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[171] [CIA [redacted]03023 | [redacted] | PLANS TO STRIKE THE UNITED STATES | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ | |]

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[172] [CIA | HEADQUAR[redacted]04 | [redacted] [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

[173] [CIA | HEADQUAR[redacted] | [redacted] [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[174] [CIA | HEADQUAR[redacted] | [redacted] [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[175] [CIA [redacted]1369 | [redacted] [redacted] [redacted] | ~~(S//OC/NF)~~ | ~~(S//OC/NF)~~ |]

[176] [CIA [redacted]03023 | [redacted] | PLANS TO STRIKE THE UNITED STATES | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[177] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[178] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[179] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[180] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~/NF)~~ |]

[181] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

[182] [CIA [redacted] | ~~(S//NF)~~ | ~~(S//NF)~~ |]

[183] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[184] [CIA [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[185] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[186] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[187] [CIA [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted] ~~NF)~~ |]

[188] [CIA [redacted] | ~~(S//NF)~~ | ~~(S//NF)~~ |]

[189] [CIA | CTC 2004-30098HC | | 6 August 2004 | | The Homeland Plot: What We Still Need to Learn | | ~~(TS/~~[redacted]~~NF)~~ | ~~(TS~~[redacted]~~/NF)~~ |]

[190] [CIA | CTC 2004-30064H | GUIDE ID: 1012/41rb1j | 12 July 2004 | | Al-Qa'ida Aiming for Homeland Strike Ahead of US Election: The Origins of the Plot | | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[191] [CIA | CTC 2004-3011H | | 15 September 2004 | | Time is Running Out to Stop Al-Qa'ida's Attack on the Homeland | | ~~(S~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

[192] [CIA | CTC 2005-30001H | GUIDE ID: 1012/6shg | 8 January 2005 | | Al-Qa'ida's Efforts Against the US Homeland: Persistent and Resilient | | ~~(TS/~~[redacted]~~NF)~~ | ~~(TS/~~[redacted]~~NF)~~ |]

[193] [CIA | HEADQUAR[redacted]04 | [redacted] [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S~~[redacted]~~NF)~~ |]

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[194] [CIA | HEADQUAR[redacted] | [redacted] | ~~(S~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[195] [CIA | HEADQUAR[redacted] | [redacted] | ~~(S/~~[redacted]~~NF)~~ | ~~(S/~~[redacted]~~NF)~~ |]

[196] [CIA [redacted]1369 | |[redacted] | [redacted] | ~~(S//OC/NF)~~ | ~~(S//OC/NF)~~ |]

[197] [Other | SSCI Report Executive Summary, Page 26 of 95 | | 13 Dec 2012 | | | | | ~~(TS/~~[redacted]~~NF)~~ |]

[198] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[199] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[200] [FBI | FBI WASH 261909Z | | 26 March 2003 | | | | | ~~(S//OC/NF)~~ |]

[201] [FBI | FBI WASH 312109Z | | 1 April 2003 | | | | | ~~(S//OC/NF)~~ |]

[202] [redacted]

[203] [redacted]

[204] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[205] [redacted]

[206] [redacted]

[207] [redacted]

[208] [redacted]

[209] [Other | SSCI Report, Volume 2, Part 2, Page 958 | | 13 December 2012 | | | | | ~~(TS/~~[redacted]~~NF)~~ |]

[210] [Other | SSCI Report Volume 2, Part 2, Page 957 | | 13 Dec 2012 | | | | | ~~(TS~~[redacted]~~NF)~~ |]

[211] [Other | SSCI report, Volume 2, Part 2, Page 958 | | 2012 Dec 13 | | | | | ~~(TS/~~[redacted]~~/NF)~~ |]

[212] [CIA |[redacted]872897 | | 4 March 1993 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[213] [CIA |[redacted]67622 | | 10 March 1993 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[214] [CIA | CIA WASH [redacted] | | | | | ~~(S//OC/NF)~~ |]

[215] [Other | SSCI Report Volume 2, Part 2, Page 960-961 | | 13 Dec 2012 | | | | | ~~(TS/~~[redacted]~~/NF)~~ |]

[216] [CIA [redacted]231584 | | 30 April 2002 | | | | | ~~(S//OC/NF)~~ |]

[217] [FBI | FBI WASH 271529Z | | 27 March 2003 | | | | | ~~(S//OC/NF)~~ |]

[218] [CIA [redacted]13890 | [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[219] [FBI | Case file[redacted] | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[220] [FBI | Case file[redacted] | | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[221] [CIA [redacted]771087 | | 9 October 2001 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[222] [Other | Report, Volume 2, Part 2, Page 975 | | 13 December 2012 | | | | | ~~(TS/~~[redacted]~~/NF)~~ |]

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[223] [CIA | [redacted] | | | | ~~(S//OC/NF)~~ |]

[224] [CIA | ALEC [redacted] | | | | ~~(TS/~~[redacted]~~/NF)~~ |]

[225] [CIA [redacted] 84094 | | 23 July 2002 | | | | ~~(TS/~~[redacted]~~/NF)~~ |]

[226] [CIA | ALEC [redacted] | 11 January 2003 | | | | ~~(TS/~~[redacted]~~NF)~~ |]

[227] [CIA | ALEC [redacted] | 11 January 2003 | | | | ~~(TS/~~[redacted]~~/NF)~~ |]

[228] [CIA [redacted] 10884 | | 18 March 2003 | | | | ~~(S/~~[redacted]~~NF)~~ |]

[229] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[230] [CIA [redacted]

[231] [CIA [redacted]

[232] [FBI | 4 201 3689 10 | 08/MAR/2010 | ~~(S//NF)~~ | CIRAS ID: 216005503]

[233] [CIA [redacted]

[234] [CIA [redacted] 65410 | | 072345Z MAR 02 | 072345Z MAR 02 | | | | ~~(S~~[redacted]~~/NF)~~ |]

[235] [CIA [redacted] 65410 | | 072345Z MAR 02 | 072345Z MAR 02 | | | | ~~(S~~[redacted]~~/NF)~~ |]

[236] [CIA [redacted] 63482 | | 122041Z DEC 01 | 122041Z DEC 01 | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[237] [CIA [redacted] 63806 | | 312043Z DEC 01 | 312043Z DEC 01 | | | | ~~(S/~~[redacted]~~NF)~~ |]

[238] [CIA [redacted] | ~~(S//NF)~~ | ~~(S//NF)~~ |]

[239] **Hassan Ghul**, a Pakistani national, was an al-Qa'ida facilitator with strong ties to senior al-Qa'ida leaders, and acted as a conduit between Abu Mus'ab al-Zarqawi and senior al-Qa'ida's leaders in Pakistan and Afghanistan. Ghul was captured [redacted] in Northern Iraq on [redacted] January 2004 and transferred to CIA custody at [redacted] on [redacted] January 2004. He was subsequently transferred to [redacted] on [redacted] Jan 2004, [redacted] Ghul was subjected to EITs from [redacted] January 2004.

[240] [CIA [redacted]

[241] [CIA [redacted] 1285 | [redacted] | ~~(TS~~[redacted]~~NF)~~ | CIRAS ID:]

[242] [CIA [redacted]

[243] [CIA | ALEC [redacted] February 2004 | ~~(S/~~[redacted]~~NF)~~ | CIRAS ID:] Compilation of Hassan Ghul Comments on Enemy Presence and Activities in the Tribal Areas

[244] [CIA | ALEC [redacted] February 2004 | ~~(S~~[redacted]~~NF)~~ | CIRAS ID:] Compilation of Hassan Ghul Comments on Enemy Presence and Activities in the Tribal Areas

[245] See CIA Office of Terrorism Analysis Intelligence Assessment: ***Al-Qa'ida Exploiting Pakistan's FATA (S//NF)*** 14 April 2004. CTC-2004-40033H (Note: this assessment was jointly prepared with CIA's Office of Transnational Issues); CIA OTA Assessment ***Al-Qa'ida Likely to Stay in Afghanistan Pakistan Border Region,*** 26 March 2004 CTC-2004-30027H, and CIA OTA Assessment: ***Al-Qa'ida's Shkai Sanctuary: A Venue for Anti-US Plotting*** CTC-2004-30084H.

[246] [CIA | ALEC [redacted] February 2004 | ~~(SECRET//OC/NF)~~ | CIRAS ID:]

[247] [CIA | ALEC [redacted] February 2004 | ~~(SECRET//OC/NF)~~ | CIRAS ID:]

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[248] [CIA | DIRECTOR[redacted] | ~~(S//OC/NF)~~ | CIRAS ID:]

[249] [CIA [redacted]67575 | 6 May 2004 | ~~(S~~[redacted]~~NF)~~ | CIRAS ID: [redacted]is included in this cable as well

[250] [CIA [redacted]67575 | 6 May 2004 | ~~(S~~[redacted]~~NF)~~ | CIRAS ID: [redacted]is included in this cable as well

[251] [CIA [redacted]66803 | 2 April 2004 | ~~(S//OC/NF)~~ | CIRAS ID:]

[252] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[253] [CIA [redacted] | | | | ~~(S/~~[redacted]~~NF)~~ |]

[254] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[255] [CIA [redacted]29454 | | 13 July 2005 | | | | | ~~(TS/~~[redacted]~~NF)~~ |]

[256] [CIA [redacted]29920 | | 14 August 2005 | | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[257] [CIA | DIRR[redacted]| | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[258] [CIA [redacted]5594 | | 20 May 2007 | | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[259] [CIA [redacted]

[260] [CIA [redacted]

[261] [CIA [redacted]29986 | 17 August 2005 | (OPS) | CIRAS ID:]

[262] [CIA [redacted]

[263] [CIA [redacted] | | | | ~~(S/~~[redacted]~~/NF)~~ |]

[264] A native Arabic and Pashtu speaker, Ibrahim spoke with a speech impediment that made it sound as if he were mixing the two languages,[redacted]

[265] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[266] [CIA [redacted] | | | | ~~(S//NF)~~ |]

[267] The other detainees are [redacted] Abu Faraj al-Libi, Khalid Shaykh Muhammad, and Abu Zubaydah.

[268] [CIA [redacted]

[269] [CIA [redacted]2383 | 6 June 2005 [redacted]| CIRAS ID:]

[270] [CIA [redacted]

[271] [CIA [redacted]

[272] [CIA [redacted]

[273] [CIA [redacted]

[274] [CIA [redacted]

[275] [CIA [redacted]2683 | | 6 June 2005 | | | | | ~~(S/~~[redacted]~~NF)~~ |]

[276] [CIA [redacted]

[277] [CIA [redacted]

[278] [CIA [redacted]

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[279] [CIA [redacted]

[280] [CIA [redacted]

1 August 2014

Note to Readers of *The Central Intelligence Agency's Response to the Senate Select Committee on Intelligence's Study of the CIA's Detention and Interrogation Program*

In June 2013, CIA provided to the Senate Select Committee on Intelligence (SSCI) a response to its draft *Study of the Central Intelligence Agency's Detention and Interrogation Program.* The Committee asked for CIA's comments to inform the planned revision of its draft *Study*, and our written response served as the basis for a robust dialogue between the Agency and the SSCI. As a consequence of a decision to declassify certain aspects of the program and in compliance with a request under the *Freedom of Information Act*, CIA's full written 2013 response now is being released.

The Agency's response was submitted in four parts:
- CIA Director Brennan's cover memo
- A summary of CIA's comments with recommended corrective actions (Tab A)
- Comments on each of the draft *Study's* 20 conclusions (Tab B)
- Comments on each of the draft *Study's* 20 examples of CIA representations of the value of intelligence acquired from detainees (Tab C)

Some of the comments in this document were amended during our oral dialogue with Committee Staff or have been overtaken by subsequent changes to the draft *Study.* Notwithstanding the Committee's revisions, we believe that the main points in our response remain relevant to the final version of the *Study*.

Below are corrections to errors in our response that surfaced since it was submitted.

Errata

Tab A, p. 10, tic 3; and Tab B, p. 44, para 4: We should not have included in our count of 29 Inspector General investigations of misconduct those cases involving detainees in Iraq or actions that occurred during renditions or transfers of detainees because those cases fall outside the scope of the Committee's *Study*. The two specific examples described in Tab B, p. 44, para 4 were among this subset of cases that are outside the *Study's* scope. Our records indicate the number of investigations that are within the scope of the *Study* is 13.

Tab B, p. 11, para 2, tic 2: Ambassadors were made aware of detention sites when they were operational but we cannot verify from our records that the Secretary and Deputy Secretary of State were made aware of every site from the onset of operations at each site.

Tab B, p. 19, para 1: Our response correctly noted that the effort by the Counterterrorism Center (CTC) to definitively establish the number of detainees held over the course of the program remained incomplete by the time a CTC officer briefed Director Hayden on that effort. However, we incorrectly characterized the status of CTC's count at that time. CTC's count was at least 112 (not "as high as 112"), even without the inclusion of detainees who were no longer in CIA's custody prior to consolidation of the program in December 2002. Including those earlier detainees would have added to CTC's count.

Tab B, p. 37, para 1, tic 2, sentence 2: Interrogation training began in November 2002, not November 2003.

Tab B, pp. 57-58 (also referenced on page 47, first partial para): In addressing the *Study's* allegation of inadequate accountability for 16 alleged cases in which enhanced techniques were used without prior Headquarters approval, the explanation we provided for the miscount was inaccurate or incomplete in some respects. Based on further research, we offer the following refined and amended explanations for the 16 cases:

- In four cases, no techniques categorized at the time as "enhanced" were used.
- In five cases, enhanced techniques were used without Headquarters approval before the January 2003 guidance requiring such approval. All of these techniques had been assessed by the Department of Justice's Office of Legal Counsel to be lawful.
- In four cases, the need for accountability was mitigated because an interrogation plan had been approved and the specific techniques used beyond those listed in the plan did not exceed its overall scope and were subsequently approved by Headquarters.
- In three cases, unapproved techniques were used and the officers involved were referred to the Inspector General.

This breakdown confirms our overall contention that the draft *Study* overstated both the number of detainees on whom enhanced techniques were used without prior authorization and the extent to which accountability fell short when such authorization was not obtained.

Tab C, p. 5, last para: We acknowledge that there was at least one instance after 2007 of a CIA officer validating an earlier document that referenced the "dirty bomb" aspect of Padilla's plotting.

Tab C, p. 9, first full tic, last sentence: "Students' interest" should have been written "student's interest" because we know of only one student in the group who had an interest in aviation.

Tab C, p. 15, bolded summary, last sentence: We should not have said the fragmentary information was "unavailable to CIA." FBI information on a second shoe bomber does appear in a January 2002 briefing item prepared for CIA's daily counterterrorism update. We do not know how the item's author learned this information and it does not appear to have been entered into record traffic that would have been readily available to analysts. Instead, the record shows clearly that information from Khalid Shaykh Muhammad (KSM) was central to CIA's effort to identify the second shoe bomber.

Tab C, p. 17, third tic: Rather than "the individual managing the plot," we should have written "the individual who was in a position to advance the plot." This terrorist had raised Canary Wharf as a potential target and was tasked by KSM to conduct surveillance of Heathrow Airport's security, but the plot was shelved after KSM's arrest.

Tab C, p. 19, bolded summary, first sentence: Instead of "KSM provided information on an al-Qa'ida operative named Zubair…," we should have written that "KSM provided information that led us to understand the significance of a Jemaah Islamiya operative named Zubair." We acknowledge that in various representations, including President Bush's 2006 speech, CIA introduced a sequencing error regarding Majid Khan's arrest/debriefings, and KSM's arrest/debriefings. We repeated that error here and on page 26 of Tab C (see next erratum). However, despite that error, our description of the impact of the information acquired from KSM in the Hambali case remains accurate. It was the combination of information from both terrorists that caused us to focus on Zubair as an inroad to Hambali.

Tab C, p. 26, italicized tic (also referenced in Tab B, p. 22, first tic, last sentence; and Tab C, p. 2, para 5, first tic, last sentence): In our review of this case, we correctly acknowledged that CIA allowed a mistaken claim that KSM played a role in Majid Khan's capture to appear in the Inspector General's 2004 *Special Review*, and we correctly wrote that this claim was a one-time error. However, our effort to provide an example of a more accurate "typical representation" of the relationship between KSM's information and Khan ran afoul of the sequencing error noted in the previous erratum. Although information from KSM was used to elicit further details from Khan, by then Khan already had provided the information that, together with what we learned from KSM, enabled us to advance our search for Hambali.

Tab C, p. 32, last sentence: We incorrectly stated that KSM's information preceded Majid Khan's information. We stand by our overall conclusion regarding the value of KSM's information.

Tab C, p. 34, last tic: We should have written "our" instead of "the early" because this error was not confined to some of CIA's early representations.

Summary and Reflections of Chief of Medical Services on OMS Participation in the RDI Program

~~TOP SECRET~~//[redacted]/~~NOFORN~~
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[redacted]

AL QA'IDA DETAINEES: the OMS Role

Press attention to the Agency's interrogation and detention program began with the 2002 capture of Abu Zubaydah, sparked again with the 2003 capture of Khalid Shaykh Muhammed, accelerated in 2004 in the wake of Abu Ghraib, and then exploded in 2005 following a number of significant leaks. By 2007 hundreds—perhaps thousands—of articles and editorials had been published on what arguably has become the most controversial program in Agency history. Viewed from within, the resulting public picture remains as much caricature as fact. If the past is any guide, however, this distorted picture will become the accepted public history of an important chapter in Agency history, with both present and future implications for those within the Office of Medical Services. These implications warrant a more informed internal account of how OMS understood and experienced this program at the time.[1]

Introduction and Contents [p. 1]
The Context [p. 2] [2001-2002]
Saving the life of a High Value Target (HVT) [p. 6] [2002]
Embracing SERE (Survival, Evasion, Resistance, Escape) [p. 10] [2002]
Initiation of "Enhanced Interrogation Techniques" (EIT's) [p. 18] [2002]
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[1] Of necessity, some broader program information is included in this chapter, to place the OMS role in perspective. Agency rendition. interrogation, and detention efforts were much more complicated than these glimpses suggest.

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[redacted]

The Context

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September 11, 2001 began unremarkably. C/Medical Services arrived in [redacted] where OMS was providing temporary medical coverage, [redacted] [redacted] Oddly, no one would answer the door at the station even though officers could be seen inside tightly gathered around a television. The World Trade Center's South Tower just had collapsed; a few minutes later the North Tower came down.[2] The Pentagon was hit. All were targets of hijacked commercial jetliners, so U.S. domestic flights were being ordered to ground and international flights turned away.

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At Headquarters that Tuesday, [redacted] morning activities were sharply interrupted by news of these attacks. Ominously, a fourth hijacked plane was headed toward Washington. The Capitol and C.I.A. Headquarters were believed prime targets. With less then 30 minutes until ETA, an immediate evacuation of the buildings was announced, excepting (at CIA) emergency personnel such as those in medical. As the minutes passed, most emergency personnel relocated to below ground floors while [redacted] and a few others remained in the first floor clinical spaces.

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In retrospect, the Capitol appears to have been the final 9/11 target, though this was averted when passengers forced Flight 93 to crash in Pennsylvania. Nonetheless the events that day were the most galvanizing since Pearl Harbor. Within a week, the President signed a Memorandum of Notification (MON) [redacted] [redacted] including "operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities."[3]

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(b)(3) NatSecAct

The perpetrators of the 9/11 attacks were identified as al-Qa'ida terrorists, and there was immediate concern about a "follow-on" attack. As then DCI Tenet later recalled, "I've got reports of nuclear weapons in New York City, apartment buildings that are gonna be blown up, planes that are gonna fly into airports all over again, plot lines that I don't know. I don't know what's going on inside the United States, and I'm struggling to find out where the next disaster is going to occur. Everybody forgets one central context of what we lived through: the palpable fear that we felt on the basis of the fact that there was so much we did not know."[4] Lacking concrete intelligence, extensive lists of potential targets were drawn up, including the country's physical infrastructure (power plants, bridges, subway systems), symbolically important buildings, theme parks, malls, and major forthcoming events such as the World Series (which was postponed a week), Super Bowl, and the Salt Lake City Winter Olympics.

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(b)(3) NatSecAct [redacted]

[3] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 1. The MON was sighed 17 September 2001.

[4] "'60 MINUTES' -- Tenet Defends High Value Detainee Program," CBS News.com, 25 April 2007. Tenet laid out the context somewhat more fully in George Tenet, *At the Center of the Storm: My Years at the CIA* (New York City: HarperCollins, 2007), Chapter 13, pp. 229-258.

While the possibility of a nuclear attack initially could not be ruled out,[5] the greatest emotion surrounded potential chemical or biological attacks. Anthrax was the single most likely biological threat, so OMS quickly acquired a large supply of ciprofloxacin (Cipro); and, in case of chemical attack, a stockpile of atropine auto-injectors.[6] OMS also arranged briefings on the Agency's best judgment on potential threats for senior medical personnel from State Department, NSA, FBI, HHS, the White House, and Congress, and compared emergency medical response plans.

In late October concerns elevated sharply when letters containing anthrax spores were delivered to Capitol Hill, fatally infecting some postal workers en route. Government agencies, including CIA, began specialized screening in their mail facilities and CIA was one of several to find trace amounts of anthrax. Given the tiny amount discovered, OMS judged that only a handful of potentially exposed employees needed to be offered Cipro prophylaxis, but DCI Tenet announced it would be made available to any concerned employee. Emergency distribution was arranged for the following day—a Saturday—and involved most of the OMS headquarters staff. Several hundred anxious Agency employees came in for individual evaluations and counseling, and were issued medication. Tenet visited during this operation and mentioned to C/MS that he thought it "a slam dunk" that al-Qa'ida was behind this attack.

Anthrax-contaminated mail also passed through a State Department distribution center, potentially contaminating outgoing diplomatic pouches. This threat, combined with the incidental "dust" found in old pouches and hoax powders mailed to many embassies, spawned local crises around the world [redacted] (b)(1) (b)(3) NatSecAct [redacted]

At Agency headquarters, all incoming mail was halted until a method for decontamination could be identified. OMS's Environmental Safety Group took the lead in this project and soon was directly running a heat-based treatment program for all incoming mail. OMS also was at the forefront of an effort to identify suitable perimeter, portal and building CBRN screening devices, which eventually led to an extensive headquarters monitoring program.

Later analysis concluded that the October anthrax attack probably was the work of a disgruntled domestic scientist, rather than international terrorists; and that all detected anthrax could be traced back to distribution centers contaminated by leakage from the two spore-containing letters mailed to Capitol Hill. Nonetheless, the extensive press coverage highlighted U.S. vulnerability to this type of attack and the high cost of responding.

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[5] Maps, probably dating from the 1950s, were provided to OMS outlining the potential effects of a weapon detonated on the Mall

[6] Some auto-injectors were issued to the Security Protective Officers, believed most likely to be exposed to a chemical attack. The only actual use of an auto-injector came when an officer inadvertently discharged one into his own leg, thinking it was a demonstration dummy.

Concurrent with these developments and with the Presidential MON in hand, the Agency moved aggressively abroad. Intense efforts were mounted jointly with foreign intelligence services to round up al-Qa'ida operatives worldwide. [redacted] Over the next five years, OMS PAs or physicians accompanied at least 120 of these rendition flights—most either to or between newly established CIA facilities.[7]

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The pre-rendition medical exam included a body cavity search (a component of which was a rectal exam), which in later years led to an occasional charge that CIA administered drugs rectally during the rendition process. The PA (or occasionally an OMS physician) did carry medical supplies for emergency use, but only once was a dangerously agitated detainee sedated during flight.[8] Eventually a few of those being transferred—mostly long-term detainees—were medicated voluntarily for conventional medical reasons (e.g., one requested a sleeping pill for the flight). No one ever was medicated rectally.

At the time of the 9/11 attacks the Taliban government of Afghanistan was hosting the al-Qa'ida leadership, its training camps, and several potential chemical/ biological/radiological/nuclear sites. In mid-October 2001 (concurrent with the anthrax scare) the U.S. launched a combined attack against the Taliban. The offensive brought together small independently operating joint CIA-Special Forces teams (which included OMS PA's), [redacted] and U.S. air power. By mid-December all major Afghan cities had been taken.[9]

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A week after the last major Afghan city fell, al-Qa'ida "shoe bomber" Richard Reid attempted to blow up a commercial jet en route from Paris to Miami. A month later *Wall Street Journal* reporter Daniel Pearl was kidnapped in Karachi and demands were issued by his captors; a few weeks later his decapitated, dismembered body was found,

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[8] Valium was administered on [redacted] flight [redacted]

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and a week after that a video of his execution was released. Although more than 2,900 al-Qa'ida operatives and associates were in custody, in 90 countries,[10] only one senior al-Qa'ida leader (Atef) had been killed (by an airstrike in November), and none had been captured. The U.S. remained braced for the next terrorist attack.

In March 2002 the newly created Department of Homeland Security established color-codes to quantify the estimated level of threat. These ranged from green (low), through blue (guarded), yellow (elevated), orange (high), to red (severe). With little hard intelligence, these levels were based largely on unconfirmed reports, non-specific terrorist "chatter," and intelligence supposition. The first announced level that March was yellow, or "elevated."

DRAFT

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[10] The first 20 military detainees to be sent to Guantánamo Bay arrived at Camp X-ray, on January 11, 2002; by the end of February about 300 had arrived, and by the end of the year, over 600.

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Saving the life of a High Value Target (HVT)

Against this backdrop [redacted] the Counter-terrorism Center (CTC) Rendition Group (RG, later Rendition and Detention Group, or RDG) came to the OMS front office late Friday morning, March 29, to say that very early the previous morning (March 28th), senior al-Qa'ida leader Abu Zubaydah ("AZ") had been captured in Faisalabad, Pakistan. Zubaydah was thought to rank third or fourth in the al-Qa'ida hierarchy, to have been "involved in every major [al-Qa'ida] terrorist operation," and to have information on immediate future threats.[11] Anticipating his capture, a rendition aircraft already was standing by [redacted] with an OMS PA on board. For the first time, the Agency was to retain custody of a terrorist, and AZ was to be taken to an Agency facility where he could be questioned by Agency (and FBI) interrogators. However, Zubaydah had been wounded during capture and would need sophisticated medical care.[12] Could OMS handle an emergency surgical mission? OMS said yes, and began to line up the requisite personnel and equipment.

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By noon, [redacted] RG was back to say that Zubaydah was to be flown to [redacted] where a holding cell was hurriedly being set up [redacted] A plan was quickly worked out for our [redacted] RMO (then on temporary assignment [redacted] to fly [redacted] and join the rendition crew. As soon as Zubaydah could be moved, this group would pick him up, and fly [redacted] A larger medical team, composed of a trauma surgeon, anesthetist, and two PA's, along with other CTC personnel and necessary medical and surgical equipment, would leave Washington that evening to receive AZ [redacted] with just 5 hours to assemble staff and equipment before departure.

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Our preferred surgeon—a cleared contractor long associated with OMS [redacted] He agreed to drive directly back and to recruit [redacted] anesthetist. The two selected PA's included one visiting Headquarters [redacted] and a surgically experienced recent hire [redacted] Field Operations and Nursing staffs quickly assembled the necessary equipment by stripping the OMS emergency room and obtaining the donation of surgical equipment—no questions asked—from [redacted] Hospitals. Absent time to

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[11] In a brief to the Department of Justice a few months later, AZ was described as al-Qa'ida's coordinator of external contacts and foreign communications, its counterintelligence officer, and to have been involved to some extent in Millennium plots against U.S. and Israeli targets, and a 2001 Paris Embassy plot, as well as the September 11 attacks.

[12] U.S. military medical facilities were not considered an option as the resulting public exposure would greatly reduce AZ's value as an intelligence source

[13] Regional coverage during this period was a challenge; [redacted] (b)(1) (b)(3) NatSecAct

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return home, the PAs went to a local mall to buy suitcases and clothes. [redacted] [redacted] who joined the team at the airport where the senior PA took him to phone booth and had him sign a secrecy agreement. Twenty-four hours later the team was setting up at [redacted]

AZ had been shot from the ground while attempting to escape along a rooftop. Initially reported to have been hit three times, his wounds were the result of a single bullet which entered his left leg anteriorly just above the knee, passed deeply through muscle tissue and exited anteriorly in the upper thigh, then reentered the lower abdomen. Fragments ended up embedded in the posterior abdominal wall. [redacted] surgeo (b)(1) done an exploratory laparotomy, repaired some bowel damage, administered seve (b)(3) NatSecAct of blood, and left behind the less accessible fragments; the leg wounds received only superficial attention.

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On March [redacted] an FBI EMT present for the Zubaydah takedown advised that although AZ remained "septic" in appearance, his vital signs were "normal" and he was "stable for travel." [redacted] RMO joined the team [redacted] and the rendition flight immediately departed [redacted] AZ was collected [redacted] (b)(1) [redacted] and the flight continued [redacted] (b)(3) NatSecAct [redacted] During the flight AZ was agitated, and his breathing somewhat labored, so small doses of Valium were administered to allow him to rest. Having safely delivered AZ to the [redacted] facility, the [redacted] (b)(1) RMO then continued on with the rendition team [redacted] then back to his post. (b)(3) NatSecAct

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On evaluation at [redacted] AZ was found to have a small entrance wound in his lower thigh, a large, fist-sized exit wound in his groin, and a recently sutured xyphoid-to-pubis laparatomy with abdominal drain. Of most immediate concern was his labored breathing and a developing fever. Despite adjustments to his antibiotic coverage, AZ's condition deteriorated over the next 36-hours to a full-blown Acute Respiratory Distress Syndrome (ARDS), accompanied by a racing pulse, falling blood pressure, fever of 104°F, and evacuating bowels. An emergency intubation was performed, and while being manually ventilated AZ was transported to the intensive care unit [redacted] [redacted] At the hospital, AZ was placed on a respirator, and (b)(1) [redacted] surgeon joined the team.[14] (b)(3) NatSecAct

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On April 1st, about the time of AZ's ARDS crisis, the White House announced his capture, including the fact that he was receiving medical care for gunshot wounds in the "thigh," "groin" and "stomach." By April 2nd, there was extensive press coverage, informed by official Pentagon news conferences and alleged inside sources. Questions were raised about where and how AZ was being treated. Defense Secretary Rumsfeld—

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[14] A [redacted] (b)(1) (b)(3) NatSecAct pulmonologist also was summoned, but offered only a limited-value, one-time consult.

presumably unaware of recent events—informed reporters that AZ's "wounds appear not to be life threatening" and that he was "being given exactly the excellent medical care one would want if they wanted to make sure he was around a good long time to visit with us."[15] Nothing was said about location.

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During the initial period of hospitalization, AZ suffered from pulmonary congestion, an atonic colon, a marked drop in his platelet count (to 32,000), fever, and an emerging bullet tract infection. After an adjustment to his antibiotic coverage, and a surgical exposure and antiseptic irrigation of the length of the bullet track (by the contract surgeon), he began to improve, with rising platelet count, some clearing of the lungs, and less sustained fever.[16] Nonetheless, as a precaution, [redacted] intensivist was requested to travel to site, against the possibility of further complications.

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As during most crises, the demand for information was unending, and in this case extended to the White House. Accordingly, on-site medical personnel, in addition to providing a 24-hour hospital presence, responded to many e-mails and phone calls, and from April 2nd onward prepared a detailed, 12-hourly cable update (at 2:00 a.m. and 2:00 p.m. locally) to allow the DCI to make timely reports. These cable reports were prepared primarily by [redacted] RMO, just arrived to monitor AZ's progress. With the RMO's arrival, and inpatient care now primarily in the hands of the [redacted] surgeon, the OMS contract surgeon and anesthetist were able to depart.

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Although showing slow overall improvement, AZ's hospital course was not without complication. On the morning of April 4th, he coughed up his respirator tube, then proved too weak to breath on his own, and was reintubated. Fortuitously, the [redacted] intensivist [redacted] oversaw further pulmonary care. Three days later—a week after his hospitalization—AZ was safely weaned from the respirator. Meanwhile, on April 6th a fever had returned, apparently triggered by a deterioration of his leg wound. On three consecutive days (April 6-8), [redacted] surgeon (assisted by an OMS PA) debrided necrotic tissue from the wound, which ultimately left the bullet tract clean but widely laid open along its entire length. A final debridement was accomplished two days later.

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As AZ's leg infection and respiratory problems came under control, new concerns presented. A rising amylase, worsening liver function tests, and a falling hemoglobin (never definitively explained) led to the discovery of an intra-abdominal inflammatory mass near the site of a bullet fragment. Reluctantly, an exploratory laparotomy was considered, but fortunately proved unnecessary. An endophthalmitis also developed in AZ's left eye, which had been opacified at the time he came into Agency hands. [redacted] ophthalmologist recommended urgent enucleation, to avoid involvement of the good eye. OMS, in consultation with cleared Washington-area specialists, opted rather for antibiotics and culture (which proved negative). This inflammation soon resolved, and eventually the left orbit atrophied without further complication.

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[15] E.g., *Los Angeles Times* and *New York Times*, both 3 April 2002.

[16] The present account is not meant to be a detailed medical history; the few specifics given here are intended only to give a general sense of the case.

These proved to be the last of AZ's medical crises, and with his continued improvement, the intensivist departed. On April 12th he was moved from the ICU to a VIP suite, afebrile, pain-free, on a full diet, with a leg wound now healthy in appearance, and able to get up and down on his own. Medical concerns were now replaced by operational concerns. (b)(1) (b)(3) NatSecAct [redacted] Now, despite a 24-hour Agency bedside presence, AZ was potentially able to speak t(b)(1) [redacted] (b)(3) NatSecAct staff, which could reveal his identity and thus whereabouts.

On April 15th, after just three days in the private suite, but two weeks after his admission and nineteen days since his gunshot wound, AZ was transferred back to (b)(1) (b)(3) NatSecAct [redacted][7] A headquarters-based physician, ER-qualified nurse, and new PA arrived to take over care. By month's end, a continuous physician and PA presence no longer were needed, and for the next three months AZ's day-to-day care was provided by TDY OMS nurses who administered twice daily, and then daily, wound care and dressing changes. For the first phase of exclusively nurse coverage, (b)(1) (b)(3) NatSecAct [redacted] RMO made weekly two-day return visits, but things went so smoothly that these eventually were discontinued.

With his leg wound visibly healing, AZ's primary medical concern was a mild prostatitis (manifest only by a trace of blood in his semen), which he feared was the first sign of an impending loss of "manhood." He also was inclined to focus on other minor complaints—especially during periods of interrogation—including some knee discomfort, intestinal gas pains, and a mild reflux esophagitis. Basically, however, he was a healthy young man given to some hypochrondriasis.

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[17] Versed and morphine were given to ease the transfer.

Embracing SERE (Survival, Evasion, Resistance, Escape]

The circumstances of AZ's capture had not lessened the urgency felt to question him about a "second wave" of al-Qa'ida attacks. Later press reports claimed that not only did his injuries not delay this questioning, but that his acute pain was exploited. The most detailed version of this myth had Agency doctors installing an IV drip through which a short-acting narcotic painkiller was switched on and off, depending on Zubaydah's degree of cooperation.[18] In actual fact, AZ was not interrogated during the painful phase of his injuries (for much of which he was on a respirator), or at any point while he was in the hospital. At no time then or later were medications of any sort withheld.

The interrogation approach initially taken with AZ was relatively conventional. Within the limits of his medical condition, these involved a combination of positive and negative incentives, with the expectation that modest pressures would be necessary to weaken his psychological defenses. Permission to use a few non-physical but mildly aggressive techniques, if necessary, had been granted just prior to his return from the hospital [redacted] These included an austere cell, limited clothing, sleep deprivation, bright lights, white noise, and dietary manipulation (i.e., a nutritionally adequate diet of Ensure supplemented with vitamins). Under the circumstances, "positive" incentives would be the return of withdrawn amenities, such as the return of full clothing, a more comfortable chair or sleeping arrangement, and a more interesting diet.

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This basic approach, OMS learned, was drawn mostly from the military's SERE (Survival, Evasion, Resistance, Escape) training program. With antecedents dating to the Korean War, SERE was designed to prepare military personnel for capture by familiarizing them with how they might react to various interrogation techniques, and offer some coping skills. It was the only extant U.S. program to subject personnel to physical interrogation measures.[19]

At one time OMS psychologists, psychiatrists, and medics were extensively involved in a SERE-like Agency program also designed to prepare employees—initially U-2 pilots—against the possibility of capture and interrogation. OMS staffers assessed candidates, monitored participants, and even served as instructors in this program [redacted]

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[18] Gerald Posner, *Why America Slept: The Failure to Prevent 9/11* (New York: Random House, 2003, pp. 184-186.

[19] During the Korean War, many American POWs collaborated to some extent with their captors. This was believed the result of interrogation techniques, which might have been resisted more effectively had previous training been available. As a result, by the mid-1950s several SERE-like training programs had been developed and implemented. When the SERE antecedents of the Agency program finally were widely publicized, particularly in 2007, it was popular to say that SERE techniques had been "reverse engineered" to produce the Agency (and military) interrogation techniques. No reverse engineering was needed, however; the interrogation techniques used on SERE trainees were simply used on detainees.

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[redacted]

[redacted] The Agency's "Risk of Capture" and "Enduring Enemy Detention" training was much less physical than SERE training (discussed more fully below), but did include sleep deprivation and confinement in a narrow, upright box (another SERE technique). The perceived need for this program dwindled in the 1980s, and it finally was terminated in the early Nineties. A few OMS staffers still on-board in 2002 had supported this program, but none were familiar with the current SERE experience, nor its more physical techniques.

The Agency office with the greatest current SERE familiarity was the Office of Technical Services (OTS), in which were located a unit of operationally-oriented psychologists whose interests in interrogation extended back almost fifty years.[20] While Agency involvement in interrogations programs had all but disappeared after the mid-1980s, a SERE-trained psychologist had joined the OTS staff in 1999, and through him OTS was acquainted with the current SERE program and some of its psychologists.

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In the immediate wake of 9/11 OTS again returned to the subject of interrogation and that September contracted with recently retired Air Force SERE psychologist Jim Mitchell to produce a paper on al-Qa'ida resistance-to-interrogation techniques. Mitchell collaborated with another Air Force SEER psychologist, Bruce Jessen, and eventually produced "Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective."[21] Following AZ's capture, Mitchell was sent to [redacted] to serve as a behind-the-scenes consultant to interrogators and the on-site OTS staff psychologist (who was there to evaluate AZ psychologically, and explore possible approaches to interrogation and debriefing.)

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Under most circumstances, interrogators seek to exploit the initial shock of capture, which in AZ's case was long since past. In lieu of this they chose to take advantage of the "shock" of his return to detainee prisoner status, in the austerity of a [redacted] cell. One day after his return from the comfortable hospital setting, a three day period of interrogation was begun, employing all the previously approved measures. The on-site OMS physician monitored this closely, and found that neither the initial three-day period of sleep deprivation nor shorter periods repeated several days later that week impacted his continuing recovery. These measures also failed to garner any dramatic new intelligence. A one day repetition the following week was similarly. ineffectual. As the on-site personnel assessed the situation, "there is unlikely to be a 'Perry Mason' moment where the subject ultimately gives up but rather will likely yield information slowly over the course of the interrogations. The subject currently is taking a highly sophisticated counter-interrogation resistance posture where his primary position is to avoid giving details."[22]

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[20] The antecedents of this unit had overseen much of the MKULTRA interrogation research in the 1950s and 1960s, published still-relevant classified papers on the merits of various interrogation techniques, contributed heavily to a 1963 KUBARK Counterintelligence Interrogation Manual and its derivative 1983 Human Resources Manual, assisted directly in early interrogations, and (with OMS) provided instruction in the Agency's Risk of Capture training. Bureaucratic tensions between OMS and OTS (and their antecedent offices) extended across 50 years, and again were at a peak in 2002. While concurrent questions of organizational charter, expertise, and placement color much of the OMS detainee experience, this complicated issued is beyond the scope of this history.

[21] Mitchell had 13 years of experience in the Air Force SERE program, and Jessen 19 years. Additionally, Jessen had worked with released U.S. military detainees in the Nineties.

The next contemplated step—which was approved for use at the end of AZ's first week of interrogation—would have been more punitive: placing him in a "confinement" box akin to that previously used in the Agency's own training program. As OMS was advised, confinement boxes had been introduced into SERE after POW's in Southeast Asia reported being placed in small, uncomfortable boxes.[23] About 60% of the POWs so treated said it led to their cooperation with interrogators. The proposed Agency box was to be 30" x 20" x 85", which was more spacious than both the "prototype" SERE box and the one once used in Agency training. The plan was to confine AZ in a reclining box for a trial period of 1-2 hours, repeated no more than 3 times a day, similar to initial SERE usage. [redacted] believed that it would "achieve the desired effect."

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OMS, concerned that AZ might accidentally or deliberately injure or contaminate his wound in the box, specified that he not be placed on his abdomen and that there be audio and infrared monitoring equipment (the latter already planned by CTC). Ultimately, use of the box was deferred so that FBI interrogators could attempt to make a deal in which, in exchange for cooperation, AZ would not be turned over to Middle Eastern countries seeking his custody. This, too, failed to gain the desired cooperation. However, rather than simply return to the planned use of the confinement box, a more systematic strategy now was developed.

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[22] [redacted] 20 April 2002 SECRET. At some early point AZ, apparently inadvertently, did give up information that led to the capture in Chicago of Jose Padilla. Padilla was planning a "dirty bomb" attack against Washington, D.C. or New York. Most of what AZ provided were guesses as to what might constitute a future target. At this time the first of what later became a steady stream of leaks was reflected in a ABC World News Tonight report that AZ "has told U.S. interrogators al Qaeda plans to attack areas where large numbers of people shop. ...And privately, some U.S. officials fear Zubaydah is toying with them, trying to deplete already stretched U.S. resources. One official tells ABC News it's going to take a long time, if ever, to break Abu Zubaydah." ABC World News Tonight ABC TV, 23 April 2002, "Abu Zubaydah Warns U.S. Investigators."

[23] Both large and small boxes actually trace to a Russian usage in World War II. "The smallest type of cell...was actually a box measuring a meter in each dimension into which the prisoner was crammed in a sitting position. A large electric bulb in the ceiling provided an excess of light and heat, and after ten to twenty hours the prisoner lost consciousness. After being revived with a bucket of icy water, he would be interrogated immediately... A similar type of cell was aptly named the 'standing coffin.' It consisted of a box about a half-meter in depth, a meter wide, and two meters high in which a prisoner could neither sit nor lie down. Sometimes the standing-coffin was a full meter in depth and the prisoner could squat on the floor; at other times the ceiling was so low that the prisoner could at no time stand fully upright." Kermit G. Stewart, *Russian Methods of Interrogating Captured Personnel*, World War II (Office of the Chief of Military History, Department of the Army, 1951), p. 316

With AZ's continued recovery, and no immediate plans for intensive interrogation, the headquarters physician and PA departed. During the follow-on (b)(1) (b)(3) NatSecAct [redacted] RMO visits, consideration was given to whether a skin graft would accelerate the healing of the leg wound. It was judged that that, given the depth of the wound, this would have to wait. Assuming it could be arranged locally, this entirely elective procedure would have to be timed so that the recovery period did not impede any ongoing interrogation. As circumstances developed, no graft was seen as necessary; by the time the wound had granulated in sufficiently, it was well on the way to complete healing.

In mid-June, AZ was informed that as a result of his failure to cooperate the sympathetic interrogation team then present was being withdrawn and that he was to be left in isolation to reconsider cooperating before a much more aggressive team arrived. Then, for almost two months he was left in the hands of "indifferent" guards who fed him at irregular hours and only once a day (albeit with sufficient nutrients for a full day). An OMS medical attendant continued to dress his wound, although at less frequent intervals, averaging about every two days. Wound healing was carefully monitored throughout, and continued its steady improvement.

Given the lack of success with AZ, SERE psychologists Mitchell and Jessen (the latter having retired from the Air Force in May and became an OTS IC) were tasked with devising a more aggressive approach to interrogation. Their solution was to employ the full range of SERE techniques. They, together with other OTS psychologists, researched these techniques, soliciting information on effectiveness and harmful after effects from various psychologists, psychiatrists, academics, and the Joint Personnel Recovery Agency (JPRA), which oversaw military SERE programs.

As later categorized by Mitchell and Jessen, the pressures to which SERE-trainees are subjected during a three-day "captivity" fall into three general categories. *Conditioning* techniques weaken psychological defenses and deprive the students of their usual sense of personal control. These include such things as stripping, diapering, sleep deprivation, dietary restriction, and solitary confinement; as noted, these measures also provide an opportunity for positive rewards for cooperation. *Corrective* techniques are physically punitive, and are designed to sharply disabuse a trainee of the notion that they won't be touched and focus them on the interrogators and the questions being asked. These include "attention" holds of the face, "attention" slaps to the abdomen and face, and slamming the student against a wall ("walling"). *Coercive* techniques are the most aggressive of the negative measures, and are designed to accelerate the trainee's entrance into full compliance. These can include placement in stressful positions, confinement in boxes, dousing with water, immersion in cold ponds, and exposure to the "waterboard" (which invokes a sense of drowning through the application of water to a cloth-covering the nose and mouth of a supine subject). At the extreme some SERE programs even used mock burials.

Despite the physical and psychological intensity of the SERE program, thousands of trainees had completed the course without physical or psychological aftereffects. In part this is because SERE candidates (and instructors) are medically and psychologically prescreened, and physicians and psychologists monitored the entire process. All measures, even the most aggressive, are designed and administered to insure the safety of those interrogated. "Slaps" are open-handed, short-arc, and directed at narrowly-circumscribed "safe" areas; those "walled" are supported with a rolled towel around the neck, and the blows directed against flexible walls designed to absorb the blow while amplifying the sound; water immersion is limited by ambient air and water temperature; and water-board applications generally are limited to 20 seconds, and no more than 40 seconds.

By early July a specific plan for the aggressive phase of AZ's interrogation had been worked out. The goal was to jarringly "dislocate" his expectations of treatment, and thereby motivate him to cooperate. (At the time AZ was believed to be author of the al-Qa'ida manual on interrogation resistance; he still seemed to think if he could hold out longer, he would be transferred into the benign U.S. judicial system.) The interrogations would be handled exclusively by the two contract SERE psychologists,[24] who would escalate quickly through a "menu" of pre-approved techniques. These were to be "the same techniques used on U.S. military personnel during SERE training" (detailed above), designed for maximum psychological impact without causing "severe physical harm."[25] A medical person with SERE experience—i.e., a senior OMS PA, who had worked in the previous Agency program—was to be present throughout and, when warranted, an OMS physician. The OMS medical officers' exclusive role was to assure AZ's safety during interrogation.

As a practical matter, and with OMS concurrence, there were to be two sizes of confinement boxes. Confinement in the previously described larger box would be limited to 8 hours (and no more than 18 hours total in a 24 hour period). A much smaller box also would be built, measuring 30" high x 21"x 30". Confinement in this box would be limited to two hours.[26] Care was to be taken not to force AZ's legs into a position that would compromise wound healing. In actual practice, the larger box was used in an upright position, through its dimensions were such that AZ (who was quite flexible), could sit down if he chose, albeit in a cramped position; even the small box accommodated a squatting position sometimes adopted by AZ on his own volition. At the planned point of peak interrogational intensity, waterboard applications would be alternated with use of the confinement boxes (in which he would "contemplate his situation") until, it was hoped, "fear and despair" led to cooperation.[27]

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[24] CTC described Jessen as a "SERE interrogation specialist" experienced "in the techniques of confrontational interrogations."

[25] Alfred McCoy, a professor of history of some note later claimed in *A Question of Torture* (REF) that the CIA approach to interrogation reflected an internal program extending back to the 1950s. Agency interest in interrogation did begin very early, and continued into the early Eighties, but was not a direct antecedent of the 2002 CTC approach, which came directly from Jessen and Mitchell's SERE experience. Both SERE and initial Agency thinking, however, drew on the same early Agency and military-funded studies. The early research was summarized in Albert D. Biderman and Herbert Zimmer, eds., *The Manipulation of Human Behavior* (New York, Wiley & Sons, 1961), with which Jessen and Mitchell were familiar. Their conceptual framework relied heavily on the Biderman chapter by Lawrence Hinkle on "The physiological state of the interrogation subject as it affects brain function." Both Biderman and Hinkle had received MKULTRA support. For McCoy's perspective, see Alfred W. McKoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York: Metropolitan Books/Henry Holt and Co., 2006). McCoy occupies a named chair at the University of Wisconsin-Madison.

OTS psychologists prepared briefing papers to accompany an Agency request to DoJ seeking an opinion on whether the SERE-techniques could legally be used in an actual interrogation. Of the possible measures, only the waterboard and mock burial were believed by the Agency's Office of General Counsel (OGC) to require prior Department of Justice (DoJ) approval. However, ten "Enhanced Interrogation Techniques" (EITs) initially were proposed: attention grasp, walling technique, facial hold, facial or insult slap, cramped confinement boxes, wall standing, stress positions, sleep deprivation, waterboard ("historically the most effective technique used by the U.S. military"), and mock burials. To these was added the placement of harmless insects in the confinement box (based on AZ's apparent discomfort with insects). After preliminary discussion with the Department of Justice, mock burial had been eliminated from consideration. Of specific interest was whether any of these measures were barred by the most relevant Federal torture statute which prohibited the intentional infliction of severe physical or mental pain or suffering.[28]

Among the items forwarded to DoJ along with the request was a 24 July 2002 OTS paper on "Psychological Terms Employed in the Statutory Prohibition on Torture," a memorandum from the Air Force Chief of Psychology Services, Major Jerald Ogrisseg, on the Air Force experience with SERE, and an OTS-prepared AZ psychological assessment. According to Ogrisseg, almost 27,000 students had undergone Air Force SERE training between 1992 and 2001, of which only 0.14% had been pulled for psychological reasons (and of which none were known to have had "any long-term psychological impact"). The OTS paper assessed the relative risk of the various techniques, and concluded that while they had been administered to volunteers "in a harmless way, with no measurable impact on the psyche of the volunteer, we do not believe we can assure the same for a man...forced through these processes.... The

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[26] This small box was not much smaller than boxes occasionally used in Agency exfiltrations a decade and more earlier. [redacted]

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[27] The quotations in this and the preceding paragraph are from an outgoing cable, from ALEC to [redacted] 9 July 2002, outlining the proposed plan. The CTC/Legal analysis was presented to the Legal Adviser to the NSC, and the DOJ Office of Legal Counsel, and Criminal Division; it also was briefed to the Counsel to the President. See CTC/Legal to [redacted] 25 July 2007.

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[28] A DOJ review of the use of mock burials would have been much more time-consuming than what was needed for the other measures. Some of this history is found in Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, pp. 13-15.

intent…is to make the subject very disturbed, but with the presumption that he will recover." "The plan is to rapidly overwhelm the subject, while still allowing him the option to choose to cooperate at any stage as the pressure is being ratcheted up. The plan hinges on the use of an absolutely convincing technique. The water board meets this need. Without the water board, the remaining pressures would constitute a 50 percent solution and their effectiveness would dissipate progressively over time, as the subject figures out that he will not be physically beaten and as he adapts to cramped confinement."[29]

DoJ's Office of Legal Counsel (OLC) prepared three memoranda in response to the Agency request, all dated 1 August 2002. An unclassified "Legal Memorandum, Re: Standards of Conduct for Interrogation…" spelled out in broad detail what would and would not fall within the provisions of the Torture Convention, as implemented within the United States. A second unclassified memo concluded that under international law, interrogations not barred within the U.S. would not be within the jurisdiction of the International Criminal Court. The third, classified memorandum, applied the judgments of the first two to the interrogation of Abu Zubaydah. This explicit memo, entitled "Interrogation of al Qaeda operative," summarized the proposed techniques, their record in the SERE program, and the proposed medical safeguards, then advised—per the Legal Memorandum—that torture, as legally defined, was "the infliction of severe physical or mental pain or suffering;" that severe *physical* pain "is pain that is difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical injury." Their conclusion was that "[n]one of the proposed techniques inflicts such pain." These explicitly included slaps, walling, stress positions, confinement boxes, sleep deprivation, and the waterboard. Nor did the waterboard legally "inflict severe [physical] suffering," because it was "simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering."[30]

With regard to whether the techniques inflicted severe *mental* pain, DoJ wrote that to be prohibited by statute they would have to cause "prolonged mental harm," "disrupt profoundly the senses or the personality" (i.e., through the administration of a "mind-altering substance or procedure") or threaten imminent death. With the exception of the waterboard (and mock burial, which had been dropped from consideration), none of the techniques therefore was prohibited. "Although the waterboard constitutes a threat of imminent death," the SERE record indicated that it did not cause the requisite

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[29] OMS was not part of the preparation of these papers and first saw them the following spring, 2003. The DoJ August 1, 2002 memorandum on "Interrogation of al Qaeda Operative," which was provided to OMS in summer 2002, did quote or summarize some portions of the OTS-prepared material.

[30] Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, "Interrogation of al Qaeda Operative," 1 August 2002. A separate, unclassified memo that date, stated, "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Legal Memorandum, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A (1 August 2002), in Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 19.

"prolonged mental harm,...e.g., mental harm lasting months or years." Thus the use of this procedure "would not constitute torture within the meaning of the statute."[31]

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With both definitive DoJ legal guidance and White House concurrence in hand, on August 3rd the field was cabled approval to proceed. Notwithstanding the reported safety of the SERE measures, OMS believed the presence of both a physician and the PA was warranted, at least during waterboard applications. In anticipation of DoJ approval, two RMOs had been asked if they were willing to participate, and both agreed. In early July [redacted] RMO, en route to a temporary assignment [redacted][2] was met and briefed at Dulles Airport. At the end of July, upon oral approval from DoJ (and the White House), he was dispatched [redacted] to await the written approval. At [redacted] RMO reconfirmed AZ's basic good health, and reported to OMS a local belief that the enhanced measures would succeed within 72-96 hours, i.e., within the length of a typical SERE program. After a week the [redacted] RMO, who had accompanied the initial AZ rendition, was to relieve this RMO; he, too, was brought to Washington for a briefing.

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During the upcoming period of intense interrogation, AZ was to be given the impression that he could not escape into an alleged need for medical care. Medical attendants would no longer dress his wound; rather, a guard occasionally left dressings and antiseptics with which he was to take care of himself. In actual fact, this "guard" was a PA or physician (with face covered, as were all the guards), who carefully monitored the wound, and made any necessary cuts of the tape as AZ took care of the dressing.

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[31] Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, "Interrogation of al Qaeda Operative," 1 August 2002. In the separate unclassified memo of that date, DoJ also wrote, "For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years." Legal Memorandum, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A (1 August 2002), in Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 19.

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Initiation of "Enhanced Interrogation Techniques" (EIT's)

On August 4th, "enhanced interrogation techniques" were begun. Within six hours these progressed from attention slaps and walling to confinement in both the large (about 5 hours) and small (about 1 hour) boxes, and finally to the water board. The initial waterboard sessions lasted about two hours, although with significant breaks and with no single application exceeding 17 seconds; and none exceeding 30 seconds in a later second session.[33] After a final half-hour in the small box, AZ was left overnight in the large box. Medical—which remained continuously on-site throughout the intense phase of interrogation—monitored AZ's condition throughout the night via a grainy video feed from inside the box. The next day, 5 August, AZ was subjected to a similar course. Neither day produced notable intelligence. Despite willingness to give other kinds of information, AZ was sticking to his previous statement that he had disclosed what little he knew on imminent threats. Informally the RMO wrote that AZ "seems amazingly resistant to the waterboard" and was "becoming habituated to the boxes." Contrary to expectations, the process was going to take "a long time." The whole experience, the RMO added, was "visually and psychologically very uncomfortable" for all those witnessing it.[34]

EITs continued to be applied with varying degrees of intensity until the morning of 8 August, when a particularly aggressive session left AZ highly distraught, and some of the on-site staff profoundly affected. In the wake, the on-site personnel concluded the intense phase should not be continued much further, and that senior CTC personnel needed to see the process first hand. The same protocols nonetheless were continued for the next few days, as plans were made for a video-teleconference (VTC) with headquarters. The on-site medical role began to include staff counseling.[35]

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On August 13th, the VTC was held, including video clips from the full range of interrogation efforts. [redacted] OMS was one of those in attendance. Despite a grainy appearance, the intensity of the ongoing interaction was graphically evident. CTC analysts, however, remained convinced that AZ had detailed time-perishable information, which warranted a continuation of the process.[36] Given the on-site OTS psychologist assessment that AZ's psychological status was fundamentally sound, and the RMO's[37] judgment that the wound still looked acceptable (albeit at some risk if the process continued another two weeks), C/CTC directed the enhanced interrogations to continue. However, to allow AZ more opportunity to cooperate, the breadth of questioning was to be broadened considerably; and all decisions on technique left to those at site.

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[33] The waterboard was positioned slightly head down—as was done in SERE—and included a capability to quickly pivot to a vertical position to facilitate clearing the air passages.[33] The medical team had limited AZ to liquids for several hours preceding this exposure, but when his anticipated vomiting included solids from early that morning, he was restricted to liquids only for the duration of the intense phase.

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[34] Lotus Note, [redacted] Medic to [redacted]MS, 5 August 2002, SECRET

[35] Thought was given locally to bringing in a staff psychologist or psychiatrist to work with the staff. The on-site OTS personnel objected to this, a reflection of long-standing antipathy between OMS and OTS on the psychology side, and an OTS belief that they should control all "operational psychology." As these were potentially staff consultations, this argument wasn't accepted. However, it was decide that a more practical approach was to have OMS staff evaluate/counsel all staff personnel on their return from [redacted] (and psychologically prescreen anyone being sent out [redacted] or other future detention sites).

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Enhanced measures continued for the next ten days, albeit at a much lower intensity. The waterboard was applied on only two of those days (August 15 and 19), and for the final three days the small confinement box was not used. Even this limited waterboard use was meant only as a brief reminder when AZ appeared to be backsliding.

Between these final two waterboard sessions, a question was raised by the field about the possible use of a medical "disinhibitor," such as sodium amytal, which prompted another OMS review of "truth serums." Such drugs, although widely regarded as unreliable sources of "truth," were believed potentially useful as an "excuse" that would allow the subject to be more forthcoming while still saving face. While undertaking the review, OMS informally agreed to consider supporting this alternative approach, providing that the actual administration was handled by a qualified physician, e.g., an OMS psychiatrist. In practice, AZ's continued cooperation with the new line of question made new measures unnecessary.[38]

Medically, AZ showed remarkable resilience throughout the process, in part due to a manifest concern for his own physical well-being. The early worry that he would attempt to aggravate his wound, especially while in the confinement boxes, proved entirely unfounded. He always was very attentive to his dressings. The boxes themselves eventually seemed to serve as an escape from more severe measures. During the most physical phase of the interrogation, wound healing did slow, and eventually there was minimal deterioration of some margins. No signs of infection presented, however, and the intense phase of the interrogation ended before further deterioration would have forced medical intervention.

During the final, transition phase of enhanced interrogation (which began on August 19th and ended the 23rd), AZ was in an increasingly benign environment. This allowed solid food, greatly improved hygiene, and the resumption of more active medical care. The edges of his wound quickly recovered, and the healing in of the basic defect resumed. When AZ entered the "debriefing" mode, both the RMO and the PA were able to depart, replaced—as previously—by headquarters-based nurses, who attended to the healing leg wound.

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[36] On-site personnel came to believe that Headquarters thought the field had lost its objectivity.

[37] By this time [redacted] RMO had replaced [redacted] RMO.

[38] Another question raised was whether a small amount of shrapnel, still imbedded in his parietal lobe after a war injury some years earlier, could explain his failure to recall certain details. Our consultants judged not.

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Within two weeks questions about AZ's candor again were raised and [redacted] RMO was sent for against the possible resumption of more intense methods. Enhanced methods proved unnecessary, but during the [redacted] RMO's weeklong stay at [redacted] the [redacted] RMO flew down to be briefed into the program. To further build the support cadre, th[redacted] (b)(1) (b)(3) NatSecAct RMO was recalled to headquarters for the same briefing.

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On [redacted], as [redacted] RMO returned [redacted] the U.S. raised its terror alert level to "orange" [high], and precipitously closed thirteen embassies and consulates. [redacted] (b)(1) (b)(3) NatSecAct

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No attacks materialized, but the anxiety level remained high. In the Washington, D. C. area, five separate "sniper" attacks the first week in October, left five random Washington area residents dead—all killed as they went about routine daily activities. For three difficult weeks, until the killers were captured, the sniper attacks were believed by some to be another terrorist assault. Amidst this local angst, on October 12th, the al-Qa'ida-affiliated JI bombed a nightclub in Bali, killing 202 people.

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Amidst these ongoing developments, two other "high value targets" (HVTs) were captured who eventually would be handed over to CTC. One was Ramzi Binalshib, a former member of the Hamburg 9/11 cell arrested in Karachi on September 11th. [redacted]

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[redacted] In mid-October, about the time of the Bali bombing, Abdul Rahim al-Nashiri was arrested [redacted] Nashiri was al-Qa'ida's senior representative in the Persian Gulf, and believed directly linked to both the East African embassy bombings and the bombing of the *USS Cole*. [redacted]

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Anticipating the transfer of at least one of these HVT's, RG hurried to complete a second facility, [redacted]

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[redacted]

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On [redacted] November, Nashiri was transferred to Agency custody, and flown on an Agency rendition flight to an Agency facility [redacted] Both an OMS PA and contract psychologist-interrogator Mitchell accompanied this rendition. At [redacted] Mitchell and Jessen (who had been there assisting with interrogations for the preceding two weeks) prepared a mental status evaluation, an assessment of Nashiri's "resistance posture," and proposed an "interrogation plan." Nashiri, then age 37, had seemed arrogant and immature, transparently feigning distress, and provocatively disrupting his interviews and questioning, but was without apparent mental disorders. The plan was to move him to [redacted] where, if he remained uncooperative, he would be subjected to increasingly intense enhanced interrogation measures. At headquarters, an OTS psychologist reviewed the assessment and plan, and agreed that there was no evidence Nashiri would be unable to endure enhanced measures or that they would cause him "severe, profound, or permanent harm." A physician thus was needed to monitor his planned interrogation.

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Nashiri was moved to [redacted] The [redacted] RMO, summoned to rejoin the on-site PA, arrived on [redacted] At [redacted] Nashiri immediately was subjected to slaps, walling, and the confinement boxes (which, because of his small stature, proved a relatively benign sanctuary). A week later, after some perceived success, these intense measures were suspended, and the [redacted] RMO departed. Unexpectedly a combination of urgent concerns led to another day of aggressive interrogation, on November [redacted] before the [redacted] RMO could arrive. These measures, which included all the previously applied measures plus 1-3 brief applications of the waterboard, were monitored by the PA and accomplished without complication.[41]

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[redacted] [redacted] now was available, so interrogations were suspended and plans laid for a quick departure [redacted] The arrival of the [redacted] RMO allowed the on-site PA—who was to accompany the transfer—to visit [redacted] and buy cold-weather clothes. On December [redacted] the transfer [redacted] was effected. Medically, both detainees were in good shape. AZ's leg wound now measured only a 1x2 cm, and was easily covered by a small bandage. Both detainees were shackled and hooded for the trip, and transported lying on their sides.[42] Initially the rendition crew proposed a gag and duct tape to prevent communication, but this was overruled by the PA. Airsickness could lead to vomiting and, with mouths blocked, to aspiration.

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[41] The PA wrote of only one session, a later IG review said two, and a later CTC summary said three; all agreed that these were of very short duration.

[42] Hooding during transfer was primarily for security reasons, to prevent detainees from identifying their locations. Eventually medical personnel became concerned that in some cases hood might unacceptably restrict air flow, so during flights detainees were monitored with pulse oximeters. If oxygen saturation began to drop, the hood was pulled above the nose. This problem eventually was remedied by replacing hoods with eye patches and opaque goggles.

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The late December *Washington Post* article was among the first to claim knowledge of the Agency's interrogation techniques. "Sources" did correctly report (or guess) that these techniques included sleep deprivation ("a practice with ambiguous status in international law"), and stress positions. They erred in alleging manipulation of Zubaydah's medical care: "National security officials suggested that Zubaida's painkillers were used selectively in the beginning of his captivity…."[45] This speculation, echoed in a *Post* editorial, was repeated more emphatically just a few months later by both the *Los Angeles Times* and *New York Times* ("U.S. officials admitted withholding painkillers;" "painkillers were withheld from Mr. Zubaydah"). And from there, it immediately went to the editorial pages of the *British Medical Journal*, which asked if "the doctors assigned to US interrogation centres protested…at the denial of painkillers to Abu Zubaydah."[46] In late 2005, "an authoritative U.S. official" finally was quoted as saying that the pain medication story "never happened." But by then it had become an accepted "fact," a fact soon to be more permanently enshrined in books.[47]

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[45] "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, 26 December 2002.

[46] "Fighting 'terrorism' with torture," BMJ 326:773-774 (12 April 2003).

[47] "Torture is Not an Option," *Washington Post*, 27 December 2002; "Rights on the Rack," Los Angeles Times, 6 March 2003; "Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, 9 March 2003. Some later repetitions: "U.S. Pledges to Avoid Torture," Washington Post, 27 June 2003 ("Officials said painkillers were used selectively to win cooperation of Abu Zubaida"); "Hussein Disoriented, Defiant, Sources Say," *Washington Post*, 15 December 2003; "The Policy of Abuse," *Washington Post*, 16 May 2004; "CIA Puts Harsh Tactics On Hold," *Washington Post*, 27 June 2004; "Disclosure of Authorized Interrogation Tactics Urged," *Washington Post*, 3 July 2004; "The CIA's Prisoners," *Washington Post*, 15 July 2004; "C.I.A. Expands Its Inquiry Into Interrogation Tactics," *New York Times*, 29 August 2004; "Vice President for Torture," *Washington Post*, 26 October 2005 The lone contradictory voice is found in "Italy presses U.S. on torture claim," *Chicago Tribune*, 28 December 2005. Among the books repeating this claim: Gerald Posner, *Why America Slept: The Failure to Prevent 9/11* (New York: Random House, 2003, pp. 184-186; Sanford Levinson, ed., *Torture: A Collection* (Oxford:

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The question of drug-assisted interrogation

The intensity and duration of AZ's interrogation came as a surprise to OMS and prompted further study of the seemingly more benign alternative of drug-based interviews.[48] The only readily accessible summary of the Agency's extensive early experience was a spring 1961 *Studies in Intelligence* article, "'Truth' Drugs in Interrogation," which had concluded,

> No such magic brew as the popular notion of truth serum exists. The barbiturates, by disrupting defensive patterns, may sometimes be helpful in interrogation, but even under the best conditions they will elicit an output contaminated by deception, fantasy, garbled speech, etc. A major vulnerability they produce in the subject is a tendency to believe he has revealed more than he has. It is possible, however, for both normal individuals and psychopaths to resist drug interrogation; it seems likely that any individual who can withstand ordinary intensive interrogation can hold out in narcosis.[49]

This wasn't necessarily the final word, however, even in 1961; Technical Services Division (TSD, predecessor to OTS) was in fact using drugs in interrogation about that time (notably LSD), and MKULTRA drug research continued at least two more years. Additionally, the 1963 *KUBARK [CIA] Counterintelligence Interrogation* manual, still included drugs among the potentially useful interrogation tools, if only for a placebo effect, or to allow the subject to rationalize giving up information.[50]

An OMS staff psychiatrist obtained from the DO's Central Eurasian Division a compilation of reporting on the Soviet drug program. OMS was aware that studies of communist "brain washing" techniques in the 1950s and 1960s had concluded that Soviet, Satellite, and Chinese successes at "mind control" were achieved without the use of drugs. The 2002 CE data was consistent with this, in suggesting that the most intense period of Soviet drug study had not come until the 1980s, in the wake of intense 1970's publicity surrounding the Agency's drug programs. It appeared that the Soviets had looked into drugs similar to those once investigated by the C.I.A. and U.S. military (e.g., psychotomimetics, barbiturates), and—as in the U.S.—had failed to find any particularly useful drug.[51]

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[48] Similar thinking was partially responsible for interest in the use of "truth serums" in the 1930s; they avoided the more physical measures then in use by some police departments.

[49] George Bimmerle, "'Truth' Drugs in Interrogation," *Studies in Intelligence* 5(2):A1-A19 (Spring 1961). Geroge Bimmerle was a pseudonym for a TSD/Behavioral Activities Branch (BAB) non-scientist working principally as a researcher and writer, but once involved in surreptitious LSD administration. This article apparently was prepared with help from Dr. Edward Pelikan, a consultant pharmacologist formerly on the Technical Services Staff (TSS, predecessor to TSD). In 1977 the Agency introduced the text of this article, without title, author, date or sourcing into Congressional Hearings on MKULTRA, as a statement of then current thinking on drugs in interrogation. LSD received only the passing comment that "information obtained from a person in a psychotic drug state would be unrealistic, bizarre, and extremely difficult to assess… Conceivably, on the other hand, an adversary service could use such drugs to produce anxiety or terror in medically unsophisticated subjects unable to distinguish drug-induced psychosis from actual insanity."

[50] *KUBARK Counterintelligence Interrogation* (1963), 99. 131 (SECRET). While no author is listed, the manual was prepared by or jointly with the TSD/BAB psychology staff. A redacted version of this manual was released to the public in 1997.

The issue of drug-based interrogation vs. SERE techniques was discussed with three OMS field-based psychiatrists at a Mental Health Division (MHD) field conference the first of October. All had been exposed to amytal interviews during their residency training or later, typically treating hysterical paralysis. The goal of the interviews had not been to establish actual facts, but rather to seek the "psychological truth" behind the condition. The psychiatrists, while not optimistic, thought that given the alternatives the subject was worth more study. A long distance dialogue continued for the next 2-3 months, while each did his literature review, and submitted thoughts.

Eventually it was decided that the most promising approach would be along the lines of traditional "narco-analysis." Unquestionably some false information would result, as was the case with more physical methods, but this wasn't necessarily a showstopper. Even the unreliable barbiturate interviews of the 1950s, in the hands of sophisticated analysts, sometimes provided useful leads.

The preferred drug appeared to be midazalam (Versed), a comparatively new benzodiazepine. Versed was one of the safest and most easily reversed benzodiazepines, and clearly much preferable to the older barbiturates. It also afforded some amnesia, a sometimes desirable secondary effect. A downside was a requirement for (presumably) physician-assisted intravenous administration, which decades before had been an argument against barbiturate interrogations—vice LSD which could be administered "silently."

Ambivalently, Versed was considered possibly worth a trial if unequivocal legal sanction first were obtained. There were at least two legal obstacles: a prohibition against medical experimentation on prisoners, and a ban on interrogational use of "mind-altering drugs" or those which "profoundly altered the senses." The latter seemed clearly aimed at hallucinogens like LSD (a legacy of MKULTRA), but the legal status of more traditional "truth serums" was not clear beyond the inadmissibility in court of information obtained under their influence. The question became moot, since CTC/LGL did not want to raise another issued with the Department of Justice.

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[51] "Drug Assisted Interviews," 10 September 2002, (SECRET) Several years later, a laborious review of Agency archival materials made possible the reconstruction of much of the early record on drug-assisted interrogation. This clarified the actual practice and conclusions at the time, but did not identify any particularly useful technique.

At the beginning of 2003 the OMS review (informally termed "Project Medication") was shelved, never to be reactivated. In retrospect, even had there been legal sanction, an opportunity to try drug-assisted interrogation may never have presented. An interrogation of the intensity of the AZ case was repeated only once thereafter, in a particularly high profile case; in all other cases, less robust methods seemed adequate. As OMS gained more familiarity with successful interrogation, another drawback to the use of a drug like Versed became evident. As a measure of accountability, coercive measures were increased when detainees intentionally provided provably false information. A detainee speaking under the influence of drugs, however, could credibly claim ignorance of anything he had said.

Failure to pursue the option of drug-assisted interrogation also spared OMS physicians some significant ethical concerns. Throughout its support of the RDG program, OMS scrupulously avoided involuntarily medicating detainees. With rare exception, detainee treatment was given only after first obtaining consent; if refused, the treatment was not given.[52] Though perhaps unlikely, it was possible that some detainees would consent to a drug-assisted interview—to "prove" that they were not withholding information. (This sometimes had been the case in both police and early Agency use of the historic truth drugs.) Whether or not consent was obtained, drug administration—presumably by a physician—clearly would have been an invasive procedure for non-therapeutic reasons.[53]

Notwithstanding the actual record, in 2003 a detailed but imaginary account was published of Agency medical personnel using Sodium Pentothal on Abu Zubaydah, who "evidently [was] the first to be given thiopental sodium."[54] Remarkably, this claim was rarely if ever repeated. When the opportunity later presented to discuss interrogation techniques with a Congressional Committee, the Agency was asked why it had *not* used drugs. The answer was that drugs don't work—which is true, probably.[55]

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[52] Only twice had violently disruptive individuals been sedated—once during a rendition, and once in detention—to avoid self-harm or endangerment to others. A few detainees on hunger strikes were involuntarily fed through a NG tube, but always with their assistance.

[53] When first discussed, the personal ethics of some of the physician staff probably would have allowed participation in legally sanctioned drug-assisted interrogations, as a more benign alternative to the very aggressive approach being employed. When waterboard use effectively ended after March 2003, the ethical equation may well have changed.

[54] Gerald Posner, *Why America Slept: The Failure to Prevent 9/11* (New York: Random House, 2003, pp. 187-188. Posner also claimed, incorrectly, that Zubaydah was hooked to a polygraph during this time.

[55] Several years later, a laborious review of Agency archival materials allowed a reconstruction of much of the early record on drug-assisted interrogation, which clarified the actual practice but did not identify any particularly useful techniques. Both barbiturates and hallucinogens seemingly had produced compliance or useful reporting in some cases, but this was against a backdrop of confabulations or deliberate misreports. For bureaucratic reasons as much as anything, LSD eventually displaced the conventional medical use of barbiturates in interrogation. Given LSD's associated medical risks and emerging societal strictures, its use later was abandoned. Objectively, aside from ease of administration it offered no more than the barbiturates beyond scaring some into cooperation.

The Role of Psychologists and Psychiatrists

The AZ interrogations highlighted just how challenging the emotional context would be, both for detainee and those present. As a result, in mid-August 2002 MHD began a debriefing assessment of all employees returning from detention sites, and by month's end was screening all those being assigned to these sites. When an interrogator training program was begun in November, candidates first had to be evaluated by MHD.

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MHD (and the OMS front office) also began quiet inquiries into the philosophy and operation of existing SERE programs. In early November 2002 a SERE psychologist assigned to the Army's Fort Bragg program spoke to an OMS/MHD [redacted] detailing the specifics of their training. The Bragg program made aggressive use of the same techniques used against AZ (other than the waterboard) and also forced trainees into a cold outdoor pool (even in winter). The role of the psychologist and a physician in the SERE program was to prescreen the students for any disqualifying physical or psychological problems, and to intervene if a student seemed at risk or an instructor became too aggressive. Their judgment on these questions was final.

At this offsite there was a lengthy discussion of the ethics of psychologist involvement in interrogation programs, particularly one modeled after SERE. The general consensus was that, given the legal rulings in hand, no ethical bar existed to *non-mandatory* participation. The appropriate psychologist role was to assess and monitor detainees and staff—as in the SERE program—but with no involvement in the actual interrogations (unless the psychologist role had been relinquished).

This psychologist role soon became a point of tension between OMS and CTC, prompted by OTS advertising for senior "psychologist/ interrogators" during the summer and fall of 2002. Psychologist/interrogators were to be "operationally oriented psychologists who are willing to support the interrogations of high value targets," "provide psychological guidance to the interrogation team chief," and "directly participate in the interrogations." Consistent with this, the on-site contract psychologist/interrogators sometimes had assumed dual roles of interrogating and assessing the psychological stability of the same detainee. Similarly, the on-site OTS staff psychologist also served a hybrid function—performing detainee mental status assessments while actively contributing to the interrogation plan. OMS believed this combination of responsibilities to be inappropriate.

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The issue was partially resolved in December 2002, when RDG assumed responsibility for the management [redacted] OTS did not have the manpower to provide regular coverage, so OMS took this over. At the time and for the next three months, no active interrogations were undertaken, so the role of the psychologist was limited to the initial assessment of new arrivals and mental health monitoring of those in detention. On one occasion, the OMS psychologist did bar the aggressive interrogation of a new arrival, who he found to be too psychologically vulnerable.

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OTS still wanted to cover the highest profile cases, so when an HVD (Asadullah) arrived [redacted] 2003, their psychologist (previously on-site with AZ) arrived to provide support. When two even more important HVDs were captured and rendered [redacted] a coverage problem developed. One of these was al-Qa'ida operations chief Khalid Shaykh Muhammed (KSM) who was to be sent on to [redacted] The other was key al-Qa'ida financial facilitator Mustafa Ahmad al-Hasawi [redacted] who was to stay [redacted] The OTS psychologists (and an RMO) went with KSM [redacted] and an OMS psychologist took over respo(b)(1)ty for [redacted] monitoring the Hasawi interrogation. With rare exception OMS handled (b)(3) NatSecAct cases thereafter.

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OTS (and the contract psychologist/interrogators) provided the psychological services to [redacted] from the time it opened in December 2002. That month, coincidentally, saw publication of the American Psychological Association's newly revised "Ethical Principles of Psychologists and Code of Conduct."[56] The APA advised that psychologists should "refrain" from entering a "multiple relationship [with a person] if [this] could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness,....or otherwise risks exploitation or harm."[57] In partial response to OMS bringing this to the attention of CTC, [redacted] Special Missions Division (SMD)—under which RDG was located—advised [redacted] in late January:

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> It has been and continues to be [Agency] practice that the individual at the interrogation site who administers the techniques is not the same person who issues the psychological assessment of record.... In this respect, it should be noted that staff and IC psychologists who are approved interrogators may continue to serve as interrogators and physically participate in the administration of enhanced techniques, so long as at least one other psychologist is present who is not also serving as an interrogator, and the appropriate psychological interrogation assessment of record has been completed.[58]

This guidance required that the psychologist who did the initial assessment not also administer EITs, but did not preclude a psychologist from alternating between an interrogator/interrogation consultant role and a psychological assessment role once the initial pre-interrogation assessment was complete. This, OMS believed, was a major concern.

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In defending the extant practice, [redacted]/SMD solicited further input from both the psychologist/interrogators and a distinguished senior contract psychologist (already working for both OMS and OTS). They jointly argued that, contrary to OMS, the Code of Ethics provided a relevant exemption from the warning against dual roles, "[w]hen psychologists are required by law, institutional policy, or extraordinary circumstances to serve in more than one role in judicial or administrative proceedings."[59] This exemption, for example, allowed a prison psychologist who unexpectedly uncovered evidence of a serious crime while treating a prisoner to testify against the prisoner. OMS believed this might well cover a dual role in which a psychologist did mental health monitoring of an interrogation, and provided other clinical support to the same individual, but rejected the notion that it possibly could extend to working both as a psychologist and an interrogator on the same person.

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[56] These were adopted in August 2002, and became effective 1 June 2003.

[57] Ethical Standard 3:05 Multiple Relationships.

[58] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 40.

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In early March, the [redacted] OMS Regional Psychiatrist visited [redacted] and reported, "It's clear that OTS has no real interest in acting as the mental health component of the interrogation team—except as it directly applies to interrogation. They are not supporting the team as an impartial exogenous superego that provides unbiased clinical assessments and addresses individual and team issues with regard to the psychological process being applied to the detainee. That would require a clear delineation of roles….their conflict of interest is resolved by focusing their energies on the interrogation and not on team and individual dynamics."

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Manpower limitations finally resolved the issue at [redacted] as they had at [redacted] OTS still did not have the staff to cover the expanding program, so in April 2003 OMS took over psychological coverage [redacted] Thereafter OMS provided almost all the psychological services to future detention sites, supplemented periodically by the OTS psychologist who had been active in the program from the beginning. As OMS assumed more responsibility, OMS psychologists and psychiatrists began to attend (as observers) a new Agency High Value Target Interrogation training class.[60] Some visited SERE programs and consulted with SERE psychologists. Finally, in summer 2003, the MHD psychologist who handled the Hasawi case was transferred full-time to the RDG staff, to provide primary coverage and coordinate the support of other OMS psychologists and psychiatrists. By 2007 [redacted] OMS psychologists and [redacted] psychiatrists had provided some support to the program.

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[redacted] SMD's support for the contract psychologist/interrogators was attributable to their being viewed as the Agency's most skilled and successful interrogators and indispensable to what was emerging as the Agency's most productive counter-terrorist program—alone accounting for over half of all al-Qa'ida-related intelligence. So highly regarded were these contractors that they commanded ready entrée to the Agency's most senior management and four times the compensation of other interrogators. Given this, (b)(3) CIAAct [redacted]/SMD still sought opportunities to further utilize their services as psychologists. Over (b)(6) the next year, this infrequently generated tasking to psychologically evaluate those they once had interrogated. Each time OMS objected, reluctantly agreeing that the contract psychologist/interrogators could possibly perform assessments without conflicting interests on those with whom they had had no dealings as interrogators. The OMS preferred solution was that these contractors choose one role or the other, not both. In May 2004 the first Inspector General report on the interrogation and detention program reviewed this history, noted the continuing OMS concerns and formally recommended a policy that "individuals assessing the medical/psychological effects of EITs may not also be involved in the application of those techniques."[61] The notion of "psychologist/interrogators" then disappeared, and the SERE contractors worked solely on the interrogation side.[62] That summer the Department of Justice, after reviewing the IG report, asked OMS if the problem had been resolved, and OMS finally could agree that it had.

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[59] Ethical Standard 3:05 Multiple Relationships.

[60] Beyond its intrinsic value, this participation addressed a lingering question about OMS involvement in the interrogation program. Amidst the January 2003 OMS-OTS tensions surrounding ethics and coverage, OTS had announced a "requirement" that formal SERE training would be prerequisite to serving as a "Special Mission" psychologists. While not enforced by CTC, the lack of OMS SERE experience was a recurring OTS theme until summer 2003.

An early task of the OMS psychologist detailed to RDG was the creation of relevant standard operating procedures (SOPs). By December 2003, and with the input of other OMS psychologists, this had grown into extensive guidance for psychologists participating in the RDG program. Specifically addressed were Qualifications and Training; Psychological Support to Interrogations/ Debriefings; Standards of Care; Guidance and Definitions For Mental Health Assessment of CIA Detainees (including a requirement for daily assessment during enhanced measures); Psychological Disturbance; Assessment of Long-term Functioning and Mental Status; Standard Operating Procedures for Mental Health Emergencies; PIA Interview (a pre-interrogation face-to-face interview assessing psychological stability, mental status, resistance posture, and suitability for enhanced measures); and even Cable Format. An appendix addressed "Ethical Standards for Psychologists Providing Support to CTC/RDG Operations," which was adapted from APA's 2002 "Ethical Principles of Psychologists and Code of Conduct."[63]

OMS psychologists nonetheless sometimes found themselves operating in a gray zone, as they alternated between operational and clinical roles in supporting the program. They assessed mental status and monitored psychological well-being, but also looked for any apparent factors which would preclude the use of enhanced interrogation techniques (e.g., a history of abuse or some significant psychological problem). If enhanced measures were employed, the psychologist reassessed the detainee's psychological state on a daily basis. While never recommending specific coercive measures (e.g., on the basis of perceived vulnerabilities), they did make recommendations on positive incentives for cooperation (e.g., playing to a narcissistic ego, or providing extra social contact in those for whom socialization seemed exceptionally important).

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[61] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 35, 106.

[62] Eventually allowing their psychology licenses to lapse, Jessen and Mitchell launched a very successful business—Mitchell, Jessen and Associates--which provided guards, interrogators, and debriefers to the CTC program.

[63] "Psychological and Psychiatric Support to Detainee Interrogations," in draft, 10 December 2003. [14 pp + 9 pp appendix

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This nonetheless was an uncomfortable, somewhat dual role. Thought was given to establishing separate operational and clinical teams to handle these two dimensions, but there never were enough resources, and with the passage of time the issue was resolved by the disappearance of subjects for aggressive interrogation. In 2005, the APA first addressed the national security context, but by then the issue was largely moot. (See the discussion under *Exposés and Ethics*.) Initial psychological assessments of potential candidates (most never subjected to EITs) had fallen from perhaps [redacted] in 2003, to [redacted] number in 2004, to about [redacted] in 2005, and [redacted] in 2006. Detainees subjected to enhanced measures declined from [redacted] in 2003, to [redacted] in 2004, and [redacted] in 2005. After 2004, at least 97-98% of the work was purely clinical, in the form of quarterly mental health clinical visits—by either a psychologists or a psychiatrist—[redacted] detainees in as many [redacted] locations. As a practical matter, the dual operational-clinical role had all but disappeared.

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Early Mistakes

From the very outset, the detention and interrogation of High Value Targets received extraordinary guidance and oversight, in part because of AZ's physical condition, in part because of the legal issues surrounding aggressive interrogation, and in part because of felt urgency in gaining the cooperation of detainees. This attention was focused almost exclusively on the HVT facilities, initially [redacted] and then [redacted] and its successors. It was attentively managed by the Rendition Group, overseen by CTC/Legal, and had an on-site staff which variously included physicians, psychologists, PA's, nurses, and Agency security officers, in addition to the CTC interrogators and debriefers.

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Even so, this was a work in progress, and occasionally an unthinking or unauthorized improvisation crossed the bounds of acceptability. When identified, these were immediately corrected and, if appropriate, the perpetrators disciplined. Given the degree of oversight, this was an early and uncommon occurrence at HVT facilities; and typically occurred in the absence of the interrogation staff. The target of several of these excesses was Nashiri, whose immaturity regularly provoked the staff. He again was subjected, with RG approval, to stress positions and sleep deprivation on arrival at [redacted] At one point, however, an interrogator inappropriately lifted Nashiri by his arms belted behind his back, which was both painful and medically risky. The onsite PA intervened, and the maneuver was not repeated. A few weeks later a debriefer, absent the interrogation team and PA, reinstated sleep deprivation, then tried to intimidate Nashiri by hooding him, spinning the magazine of a revolver, and starting up a power drill (albeit not actually touching the detainee). These actions led to disciplinary measures.[64]

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Not all early Agency detainees were held in these carefully overseen RG HVT facilities. Many suspected terrorists were rounded up during military action in [redacted] some of potential intelligence value. [redacted]

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[redacted]

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[redacted] also had no written interrogation guidelines, though early on was granted permission to employ sleep deprivation, solitary confinement, noise, and

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[64] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 41-44. Nashiri also had cigar smoke blown in his face, and may have been scrubbed with a wire brush.

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eventually standing sleep deprivation, nakedness and cold showers. As these were not "enhanced" techniques, no medical monitoring function was specified, nor was OMS advised of interrogations. When [redacted] detainees needed medical care, the PA assigned TDY [redacted] was called. This happened every week or two, largely for entirely routine complaints.[65] Interrogators at [redacted] left to their own devices, sometimes improvised. These improvisations varied from unauthorized SERE techniques such as smoke blown into the face, a stabilizing stick behind the knees of a kneeling detainee, and cold showers, to undisciplined, physically aggressive "hard takedowns" and staged "executions" (though the latter proved too transparent a ruse).

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The only death tied directly to the detainee program took place in this context at [redacted] It came about as the result of an inexperienced local staff being left without clear guidance, or any monitoring requirement, at a time of dramatic temperature change.

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[redacted] October 2002, a suspected Afghan extremist named Gul Rahman was captured in Pakistan, and on November [redacted] rendered to [redacted] His principle interrogator was psychologist/interrogator Bruce Jessen, on site to conduct in-depth interrogations of several recently detained al-Qa'ida operatives. For a week, Rahman steadfastly refused to cooperate despite being kept naked and subjected to cold showers and sleep deprivation. Jessen was joined by psychologist/interrogator Mitchell on November [redacted] ([redacted]. At this time the [redacted] PA visited [redacted] and found no pressing medical problems,[66] but in view of a recent temperature drop recommended that the detainees be provided with warmer clothing (between November [redacted] and [redacted]; the [redacted] low had fallen eleven degrees to about 31°F). [redacted] the psychologist/interrogators performed a final mental status exam on Rahman and recommended "continual environmental deprivations." They, (b)(1) (b)(3) NatSecAct [redacted] PA, then departed [redacted] the evening of November [redacted][67]

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Over the next few days, temperatures [redacted] improved (highs up fifteen degrees [redacted] lows up nine degrees [redacted]) but Rahman's demeanor and level of cooperation did not. When his food was delivered on the [redacted] he threw it, his water bottle and his defecation bucket at [redacted] guards, saying he knew their faces and would kill them when he was released. On learning this, the Site Manager directed that Rahman, who wore only a sweatshirt, be shackled hands and feet, with the shackles connected by a short chain. As such, he was nearly immobilized sitting on the concrete floor of his cell. The temperature had again droppe (b)(1) (b)(3) NatSecAct [redacted] the preceding evening, and

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[redacted]

[67] Many details are in IG Report of Investigation, "Death of a Detainee in [redacted]" 27 April 2005.

the night Rahman was short-chained reached a low of 31°F. Although Rahman allegedly looked okay to the guards during the night, he was dead the following morning.

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(b)(3) NatSecAct

An autopsy—performed by a (b)(6) pathologist (b)(6) and assisted by the [redacted] PA [redacted] to [redacted]—found no trauma, toxicology, or other pathology to explain the death. On a clinical basis, the pathologist attributed cause of death to hypothermia, consistent with the absence of specific findings. Rahman lost body heat from his bare skin directly to the concrete floor and was too immobilized to generate sufficient muscle activity to keep himself alive.[68]

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Gul Rahman's death triggered several internal actions, including the generation of formal DCI guidelines on the handling and interrogation of detainees (which basically codified existing RG practice), and the requirement that all those participating in the program document that they had read and understood these requirements.[69] The "Guidelines on Confinement Conditions for CIA Detainees" (28 January 2003) required, among other things: documented periodic medical (and when appropriate, psychological) evaluations; that detainee food and drink, nutrition and sanitary standards not fall below a minimally acceptable level; that clothing and/or the physical environment be sufficient to meet basic health needs; that there be sanitary facilities (which could be a bucket); and that there be time for exercise. The "Guidelines on Interrogations Conducted Pursuant to the Presidential Memorandum of Notification of 17 September 2001" specified that EITs could not be used without prior Headquarters approval, must be preceded by a physical and psychological exam, and must be monitored by medical personnel. Even standard techniques (those deemed not to incorporate significant physical or psychological pressure) required prior approval "whenever feasible." These standard techniques were described as including sleep deprivation (up to 72 hours, reduced to 48 hours in Dec 2003), diapering (generally not to exceed 72 hours), reduced caloric intake (still adequate to maintain general health), isolation, loud music or white noise, and denial of reading material.

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Renditions and Detainees Group (RDG, the renamed RG) in December was given responsibility for oversight [redacted] Coincident with this, OMS took over psychologist coverage there, which began with the assessment of some [redacted] detainees then on site. The [redacted] PA also began monthly cable summaries of detainee physical health.

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The deliberate use of temperature extremes as part of the interrogation process eventually became an accepted fact in press coverage of the Agency program. These

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[69] "Guidelines on Confinement Conditions for CIA Detainees" (28 January 2003)

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[redacted] (b)(3) NatSecAct

accounts began in March 2003 with an error-filled, though widely cited *New York Times* piece on interrogation techniques, which included an alleged account of the interrogation at Bagram Air Base of Al-Qa'ida facilitator al-Farouq the previous summer: "[A] western intelligence official described Mr. Faruq's interrogation as 'not quite torture, but about as close as you can get.' The official said that over a three-month period, the suspect was fed very little, while being subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees to 10 degrees. In the end he began to cooperate."[70] Perhaps because the imagined temperature range was not deemed credible, this claim was not soon repeated.

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(b)(3) NatSecAct

The only time deliberate manipulation of cell temperature was proposed for an RDG detainee came with the capture of Khalid Sheik Mohammed, the most important HVT yet taken. Though not part of DCI guidance, "uncomfortably cool temperatures" were included in the submitted interrogation plan. Reading this, and in view of the recent Gul Rahman experience, OMS sent the attending medical staff some reference material, including WHO-recommended ambient temperature ranges (no lower than 64°), optimal temperatures (78° clothed, 86° unclothed), and the "thermoneutral zone" (68-86°) below which ambient temperature monitoring was necessary.[73] Were a deliberately cool space to be used, the lower limit was 55°, and any confinement between 55-60° limited to 2-3 hours unless the detainee was free to move around or sit on a protective mat. Below an ambient temperature of 64°, detainees were to be monitored for hypothermia.

(b)(3) CIAAct
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[redacted] CTC soon specified that detention cells be maintained between 75-78°. Eventually, in June 2004, a DO review of the program noted that "uncomfortably cool temperatures" have "not been used as part of CTC's interrogation program," and

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[70] "Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, 9 March 2003. This also was one of the early articles to charge that the Agency withheld painkillers from Zubaydah.

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[redacted]

recommended that such be deleted from the list of interrogation techniques.[74] OMS personnel confirm that temperature manipulation never became part of the RDG program, and that no RDG detainee was exposed to extreme temperatures. When the 14 remaining HVDs were transferred to Guantánamo in 2006, most reported to the ICRC that initially they were held in cold rooms. Their perception of "cold" was primarily a reflection of personal comfort levels, and not the actual ambient temperature.

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[74] Memorandum for Deputy Director of Operations, "Review of CIA Detainee Program in Response to DCI Query," 30 June 2004.

KSM and the Waterboard

The 1 August 2002 DoJ approval letter had characterized the SERE waterboard process, as follows:

> "…once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth… [This] produces the perception of 'suffocation and incipient panic,' i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20-40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted and the individual is allowed to breathe for three or four full breaths…The procedure may then be repeated…."

More broadly DoJ wrote that their general expectation was that "repetition [of any technique, not just the waterboard] will not be substantial because the techniques generally lose their effectiveness after several treatments." On the question of safety, DoJ had written, "You have informed us your on-site psychologists, who have extensive experience with the use of the waterboard in Navy training, have not encountered any significant long-term consequences from its use." Separately, OMS heard from CTC that most SERE programs had dropped the waterboard because it had proven impossible to resist. OTS considered it the most critical element in the program—a point, OMS later learned, explicitly made to DoJ.

Subsequent to the AZ interrogations, OMS learned from medical personnel present at the time that most of his waterboard applications were very brief, though sometimes quickly repeated; the guess was that there had been about 30-40 significant applications. (An IG review of all but one sessions, counting applications as brief as two seconds found a total of 81 exposures, albeit with only three as long as the 20-second SERE minimum.[75]) During these applications a significant amount of water entered AZ's mouth and oropharynx, leading him to swallow as much as he could, and provoking an occasional bout of vomiting. During the second-to-last waterboard session (the twentieth), AZ appeared briefly unresponsive, with his open mouth full of water. The interrogator righted him and applied a xyphoid thrust, with AZ coughing out a copious amount of liquid. This episode, from application to cough, lasted only 8 seconds, and

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[75] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 36. On average there were 4 applications per session, with a range of 1-11 and an average application lasting 9 seconds. Twenty-two applications were at least 10 seconds long, but only 3 reached the SERE minimum threshold of 20 seconds. In his 2006 account of this experience to the ICRC AZ stated that when the water was poured he could not breath for "a few minutes" until the bed was rotated into an upright position; and that he had five waterboard sessions of 1-2 applications, and one of 3 applications. He singled out the straps "on my wounds" which attached him to the waterboard as causing severe pain, but in fact the straps were carefully placed to avoid the wounds.

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there were no apparent aftereffects. A final session of two brief water applications two days later was accomplished without further problems.

While the experience with AZ supplemented the sparse information available from the DoJ approval letter, it was not apparent to OMS that the AZ applications departed appreciably from the SERE technique. There were questions about the typical number of applications used in SERE, and whether AZ's brief "spell" was unusual, which seemed worth investigating. That winter OMS sought information directly from medical personnel in the Army and Navy SERE programs, ostensibly researching options for an Agency-run training program. Although limited by what could be discussed on the phone and slowed by travel schedules, OMS eventually learned that Agency waterboard technique differed substantially from that of the Navy program (the only one in which the waterboard was still used).

The waterboard experience was mandatory for all Navy SERE teaching and monitoring staff, but fewer than half their trainees were put on the board. Most of those who were received only a single application of 20-30 seconds, and no one had more than two applications. Water was applied primarily to the upper lip where it saturated a cloth being lowered over the nose and mouth; little if any water passed through the cloth into the mouth. The goal wasn't to "break" the students, but rather to highlight a SERE teaching point that things always could get worse; and to encourage (rather than force) reasonable countermeasures. As used within the program, the waterboard had proven to be very safe; complications among their prescreened students were extremely rare, and short-lived.

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This emerging understanding coincided with the capture and initial interrogation of terrorist Khalid Shaykh Muhammed, mastermind of the 9-11 attacks, operations chief of al-Qa'ida, and unquestionably the number three man in its hierarchy. He had been captured [redacted] on March 1, [redacted] If anyone knew of imminent al-Qa'ida attacks, it was "KSM."

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The [redacted] RMO had been (b)(1) [redacted] since [redacted] February, to provide general medical support to detainees the (b)(3) NatSecAct interrogation of high value terrorist Asadullah. His intake exam of KSM revealed an obese 38-year-old, with no significant medical problems, but who was demanding and narcissistic and refused both food and liquids. Considering the rejection of fluids unsafe, the RMO administered a tap water enema, following which KSM discontinued his fast. After several days of unsuccessful interrogation (involving most measures other than confinement box and waterboard), KSM was transferred [redacted] with the RMO accompanying.

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By this time OMS had begun to assemble a guide for medical personnel supporting the interrogation program, which brought together and expanded on material previously sent to the field. A working draft section on the waterboard reflected both the

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experience to date and what had been learned from the Navy. One goal of this section was to insure that physicians monitoring the waterboard not be misled by previously issued SERE-based reassurances—so differences between the SERE approach and that of the Agency were spelled out in detail.

One or two applications safely given to thousands of trainees said something about risk, but AZ was the only multiple-application case known to us. He may have had a period of non-responsiveness, so a limit on the number of applications probably was in order. The provisional thinking was that, absent any emerging medical problems, 2-3 sessions of 2-3 applications per day probably was medically safe during the first 2-4 days, but that special attention probably was necessary after that. An upper limit of 20 applications in a week was considered, but as "it [was] hard to imagine an operational argument for continuing [the waterboard] after that degree of 'failed' treatments" it was thought that such a high number "may well be moot."[76]

To assist with future reviews, RMOs monitoring the waterboard were to report all waterboard sessions in detail. This was to include the length of applications, volume applied, whether water entered the naso- or oropharynx, whether a seal was achieved, and (b)(1) (b)(3) NatSecAct the interval between applications. About March 11th, this in-process "OMS Guidelines on Medical and Psychological Support to Detainee Interrogations" was sent informally to the RMO and PA on-site at [redacted] and th[redacted] (b)(1) (b)(3) NatSecAct RMO soon slated to travel there.

(b)(1) (b)(3) NatSecAct Meanwhile, KSM's interrogation had resumed not long after his transfer to [redacted] and on March 10 he was first subjected to the waterboard (5 applications). As with AZ, the interrogation was handled by psychologist/interrogators Jessen and Mitchell, and monitored by the OTS psychologist who had worked with AZ. Two days later, the waterboard again was used, but this time with an intensity far exceeding anything in the past. In five sessions spanning a 24-hour period, the waterboard was applied over 80 times, almost half lasting 20-40 seconds. OMS first learned of this from the RMO who was seeing the waterboard used for the first time. He had repeatedly re-examined KSM throughout this period and was struck by how well KSM had withstood the experience.[77]

(b)(3) CIAAct (b)(6)

On receipt of these reports [redacted]/MS went to [redacted]SM to report that OMS thought that extent of waterboard usage was both excessive and pointless. OMS also doubted that repetitive applications had a cumulative effect, as sleep deprivation unquestionably did, and later followed up with a note to CTC/LGL saying that while we believed "the unpleasantness/discomfort of the [waterboard] process indeed would persist [through multiple applications], perhaps to the point of becoming intolerable;" any detainee

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[76] Our expectation remained that the waterboard would prove irresistible, were information actually being withheld. Our draft text included the observation that "[i]t would appear that subjects cannot maintain psychological resistance to this technique more than a few days, at most"

[77] As precautions, the RMO had monitored KSM's blood oxygen with a pulse oximeter, and required that saline be alternated with water, to avoid water intoxication.

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uncertainty about what was happening "certainly would diminish with identical repetitions of the same process—the novelty and initial shock having worn off."[78] In essence, once a detainee was aware that he could withstand the waterboard, it was just a matter of whether he wanted to continue to put up with the traumatic experience.

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After the [redacted]MS visit, RDG sent a cable suggesting that KSM's interrogation rely less exclusively on the waterboard. Standing sleep deprivation was begun, and intermittent water dousing. Two days later KSM again was subjected to the waterboard, though at a far reduced level. Over the following week he had a total of nine waterboard sessions, involving about 90 discrete applications, nearly half lasting 20-40 seconds. By the time the waterboard was finally discontinued, on March 24th, KSM had experienced over 180 applications, about 40% of which were at least 20 seconds long. This was twice the number of exposures experienced by AZ, and the applications had averaged twice as long (18 seconds vice 9).[79]

KSM had early developed reasonably effective countermeasures, breathing from the side of his mouth, holding his breath, and swallowing voluminous quantities of water. The interrogators dealt with this by dramatically increasing the water volume, timing applications to coincide with expiration, generating startle reflexes by splashing cold water on his chest and abdomen, holding his lips, and ultimately even creating a small reservoir of water directly over his mouth. Remarkably KSM showed no signs of a physical impact during any point in this ordeal. As with AZ, he developed a few abrasions on his lower legs struggling against the restraining belts, but this problem was remedied through adjustment of the straps and treatment of the abrasions.

When the final version of the OMS Guidelines was distributed on April 1st, it detailed appropriate medical precautions, and retained an explicit juxtaposition of the SERE waterboard technique and experience with that of the Agency. While no specific limits were set on applications per session, it was observed that as many as 25 applications probably would be safe during the first week, but thereafter only sporadic waterboard use would be acceptable.

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By this time OMS was convinced that the Agency had been poorly served by shallow research on the waterboard and its purported irresistibility. Additionally, OMS (and the Inspector General) heard that rather than having "extensive" experience, neither of the two psychologists/interrogators previously had used the waterboard; and that only one had even seen it in use. This was consistent with their having worked in the Air

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[78] [redacted]MS to[redacted]CTC/LGL, 28 March 2003, responding to a [redacted] cable critique of the proposed OMS Guidelines on the waterboard, which the RMO had shared with [redacted] personnel. The interrogators asserted that the waterboard had been selected specifically because it did not lose effectiveness with repetitions, and that they knew of no evidence that effectiveness was loss.

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(b)(3) NatSecAct

[79] In late 2006 KSM reported to the ICRC that water had been poured onto a cloth by one of the guards "so that I could not breathe" and that "[t]his obviously could only be done for one or two minutes at a time." He remembered the process being repeated for about an hour.

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(b)(3) NatSecAct

Force SERE program, which had not used the waterboard for years, and seemed to explain the wide disparity between their methodology (number of repetitions, length of applications, volume of water,[80] and technique) and that described to us by the Navy. In essence, the experience with AZ and KSM had been little more than an amateurish experiment, with no reason at the outset to believe it would either be safe or effective.[81]

Some within the RDG leadership agreed with OMS on this point, and with the view that the value of the waterboard was vastly overstated; others thought the waterboard was key to the success of the two most important interrogations in a dramatically successful program. In fact, after his period of enhanced interrogation, AZ was a remarkable intelligence resource. As "the professor," he provided a veritable encyclopedia of useful material. Later he attributed his cooperation to various factors, including an interrogation of such severity that it allowed him to rationalize cooperation to Allah. (He also once said he cooperated because of the medical care given "to an enemy"—like his mother would have done. He believed the medical staff at least twice had saved his life, though noted this had denied him martyrdom.)

In practice, however, AZ's cooperation did not correlate that well with his waterboard sessions. Only when questioning changed to subjects on which he had information (toward the end of waterboard usage) was he forthcoming. A psychologist/interrogator later said that waterboard use had established that AZ had no further information on imminent threats—a creative but circular justification. In retrospect OMS thought AZ probably reached the point of cooperation even prior to the August institution of "enhanced" measures—a development missed because of the narrow focus of questioning. In any event, there was no evidence that the waterboard produced time-perishable information which otherwise would have been unobtainable.[82]

KSM had proven much more resilient than his soft appearance suggested, even during the period of most intense waterboard use. He figured out early that, however unpleasant the waterboard experience, it wasn't going to get any worse, and he knew he could handle that. (AZ also seemed to be aware that he wasn't going to be allowed to injure himself on the waterboard, but was more emotional about the experience.) Ultimately it was 6½ days of standing sleep deprivation (extending a day past the final use of the waterboard) that led KSM to lose his composure and begin to cooperate. Thereafter, he too became a font of useful intelligence. The extensive waterboard use conceivably contributed to this, but it did not seem so to the medical personnel. If anything, the RMO thought KSM more steeled and recalcitrant just before and after the treatments, which also provided periodic relief from his standing sleep deprivation.

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[80] An average of five gallons per session was used on KSM, some being splashed on his chest and abdomen. This was about five times the volume allowed in a SERE session (which also included splash, but was delivered in a single application).

[81] This OMS view was well known through it's inclusion in the final May 2004 Inspector General Report: "According to the Chief, Medical Services, OMS was neither consulted nor involved in the initial analysis of the risk and benefits of EITs, nor provided with the OTS report cited in the OLC opinion. In retrospect, based on the OLC extracts of the OTS report, OMS contends that the reported sophistication of the preliminary EIT review was exaggerated, at least as it related to the waterboard, and that the power of this EIT was appreciably overstated in the report. Furthermore, OMS contends that the expertise of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no a priori reason to believe that applying the waterboard with the frequency or intensity with which it was used by the psychologist/interrogators was either efficacious or medially safe." OMS also thought it inappropriate that the only interrogators authorized to use the waterboard were judging its effectiveness.

[82] By the time AZ's exposure to the waterboard ended, he had been in detention almost five months.

An Agency Inspector General study of the detention and interrogation program was ongoing at the time of KSM's interrogation, and when issued in 2004 closely mirrored the OMS perspective. Agency waterboard use "went beyond the projected use of the technique as originally described to DoJ."[83] In all three cases "[t]he waterboard's use was accelerated after the limited application of other EITs…because the waterboard was considered by some in Agency management to be the 'silver bullet,' combined with the belief that each of the three detainees possessed perishable information about imminent threats against the United States." The IG noted that AZ did provide more intelligence after being subjected to the waterboard, but said it was unclear whether another factor was at play. "In Khalid Shaykh Muhammad's case, the waterboard was determined to be of limited effectiveness. One could conclude that sleep deprivation was effective in this case, but a definitive conclusion is hard to reach considering the lengthy sleep deprivation followed extensive use of the waterboard."[84]

Several of the OMS concerns were addressed by RDG in the months following the KSM interrogation. DoJ, senior White House officials, selected NSC principals, and the leadership of the Congressional Oversight Committees were all briefed on the Agency's "expanded" use of EITs including the waterboard; and DoJ advised that from their perspective these deviations were not significant.[85]

In mid-May 2004, just over 13 months after the waterboard was used on KSM, the *New York Times* carried the first published reference to Agency waterboard use.[86] The context was the publication just a few weeks earlier of photos of Iraqi prisoners being abused at Abu Ghraib prison. The *Times* article, based on information from sources with imperfect knowledge (who again alleged the withholding of pain medication), also correctly reported that Agency interrogation techniques were drawn from a military training program (unnamed), had been endorsed by the Justice Department, and used "graduated levels of force, including a technique known as 'water boarding.'" Less accurately, waterboarding was said to involve a prisoner being "strapped down, forcibly pushed under water and made to believe he might drown."

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[83] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 5.

[84] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 90-91. One of the SERE psychologists also had explained that the "Agency's technique is different because it is 'for real' and is more poignant and convincing." (Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 357.

[85] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 23-24.

[86] "Harsh C.I.A. Methods Cited in Top Qaeda Interrogations," *New York Times*, 13 May 2004.

This article, and a June 2004 *Washington Post* article on DoJ's narrow 2002 definition of torture,[87] ushered in an avalanche of press and editorial attention to interrogation techniques, which increasingly were labeled as "torture." The waterboard quickly became the symbol of Agency torture. Within the Agency, the waterboard was recognized as being in a category by itself—being the sole EIT designated "Level 2"—but, armed with the DoJ interpretation, both the Agency and White House continued to deny that Agency detainees had been tortured. Faced with unrelenting criticism, the White House and DoJ soon announced that the August 2002 guidance was being redrafted. Pending this, the press reported, the CIA had put its harsh tactics on hold.[88]

In practice no one had been subjected to the waterboard since KSM, and no new HVD taken into custody since the spring 2004 media reports. It wasn't so much that "harsh" tactics were on hold, as that there were no new candidates for enhanced interrogation. This changed at the end of July, when Janat Gul [redacted] (b)(1) (b)(3) NatSecAct [redacted]—was transferred to Agency custody. An al-Qa'ida facilitator, Gul was believed knowledgeable about plots timed to coincide with the November 2004 Presidential Elections; he immediately was approved for a range of enhanced measures, though not the waterboard. Some senior managers still believed the waterboard might nonetheless be useful, so the Agency asked Justice to re-evaluate its use in this specific case.

On August 6, 2004 DoJ replied that they considered it "a close and difficult question," but concluded that subjecting Gul to the waterboard "outside territory subject to United States jurisdiction would not violate any United States statute..., nor would it violate the United States Constitution or any treaty obligation of the United States." This judgment was conditional on physician and psychologist pre-evaluation and continued monitoring, and—on the basis of new RDG guidance—waterboard use being limited to no more than two 2-hr waterboard sessions per day, with the total time of actual applications during the day not exceeding 20 minutes. There were to be no more than 15 days of use, during a maximized authorized period of 30 days.

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[87] "Memo Offered Justification for Use of Torture," Washington Post, 8 June 2004. DoJ guidance had been alluded to, without specifics, as early as an 11 May 2004 *Washington Post* article, Secret World of U.S. Interrogations," and subsequently discussed in the *New York Times*, *Newsweek* and *The Wall Street Journal.* [redacted] (b)(1) (b)(3) NatSecAct [redacted]

[88] "Document on Prison Tactics Disavowed," Associated Press, 23 June 2004; "Justice Dept. Rewrites Prison Advice, " Associated Press, 24 June 2004; "CIA Puts Harsh Tactics on Hold," *Washington Post*, 27 June 2004.

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On seeing the DoJ memo, OMS advised RDG that the new limits still posed potential medical risks. Accordingly,[redacted]MS and[redacted]RDG jointly revised the allowable exposures downward, further reducing the number of days during which the waterboard could be used by two-thirds, and the time allowable for applications per 24-hours from 20 minutes to 12.[89] DoJ was advised of these reductions, and incorporated them into a later approval. As previously, the primary OMS area of responsibility was safety and not value or effectiveness. Neither OMS nor many in RDG believed even this reduced level was operationally necessary. In extraordinarily resistant cases,[redacted]MS believed that at most a single "warning" session of 2-3 applications—perhaps repeated once, at week later—might be tried if critical, urgent information was involved, but even then other measures would be preferable.

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Janat Gul proved less important than hoped, so interrogators never requested to use the waterboard. Had they done so, the on-site physician likely would have barred its use. At about age 40, Gul weighed 280 pounds (at a height of 6 feet) and was sufficiently thick-necked and out-of-shape that any resulting medical emergency could not easily have been treated.[90]

The May 2004 Inspector General report, in noting the uncertainty about the effectiveness and necessity of individual EITs, formally recommended that the DDO, together with OMS, DS&T and OGC, "conduct a review of the effectiveness of each of the authorized EITs and make a determination regarding the necessity for the continued use of each, including the required scope and duration of each technique."[91] Outside representation was to be included on the review team.

An indirect response to this recommendation came in an in-depth DO review of the CIA Detainee Program completed in June 2004, which was to have included an assessment of "the effectiveness of each interrogation technique and environmental deprivation." At that time OMS advised that it did not have sufficient outcome data to make this assessment and that were the data provided there needed to be some written assurance that a "study" of this sort would not violate Federal law against experimenting on prisoners.[92]

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[89] No more than 6 applications of ten seconds or more were to be allowed in a session, and no more than 12 total minutes of application; no more than two sessions were allowed in a 24-hour period; and no more than five days of waterboard use in the 30-day period during which the waterboard was authorized.

[90] No one in the SERE program was known to have experienced a laryngospasm, but this always was OMS' most serious concern. If needed, emergency intubation or a tracheostomy would have been very difficult in this case.

[91] Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 8

When the Inspector General continued to press for a study, RDG proposed in early 2005 that an internal review be undertaken by a small team composed of a senior person from the Counter Intelligence Center, the recently retired [redacted] Medical Services, and possibly a psychiatrist. At the time there had been only twenty-nine enhanced interrogation cases, so the analysis—now considered "quality control" rather than human subjects research—would be rather limited. Nonetheless, insights were considered likely to emerge. "EITs consistently associated with success likely will be evident; those of questionable success also may be evident (e.g., in cases where a second EIT of more consistent success always has been concurrently present). At the least, the record will allow a more data-based assessment of the original assumptions extrapolated from the military training programs, and allow some determination as to whether the expectations regarding specific EITs in fact were realized."[93] The unstated goal was to objectively evaluate whether the waterboard had made any positive contribution to the program.

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In part to undermine the notion that individual interrogation techniques could be studied, psychologist/interrogators Jessen and Mitchell provided an instructive overview of "interrogation and coercive physical pressures."[94] Refusal to provide intelligence, they wrote, "is not overcome through the use of *this physical technique* to obtain *that effect*…independent of the other forces at work. Such thinking led some people not involved in the actual process of interrogation to believe that the relative contribution of individual interrogation techniques can be teased out and quantified…." [emphasis in original] Their work as interrogators was said to be far more complicated:

> "…the choice of which physical techniques, if any, to use is driven by an individually tailored interrogation plan and by a real-time assessment of the detainee's strengths, weaknesses and reactions to what is happening. In this process, a single physical interrogation technique is almost never employed in isolation from other techniques and influence strategies, many of which are not coercive. Rather, multiple techniques are deliberately orchestrated and sequenced as a means for inducing an unwilling detainee to actively seek a solution to his current predicament, and thus work with the interrogator who has been responding in a firm, but fair and predictable way."[95]

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[92] Memorandum for Deputy Director of Operations, "Review of CIA Detainee Program in Response to DCI Query," 30 June 2004.

[93] "Study Proposal" attached to Lotus Note, [redacted] to [redacted] 24 Febraury 2005.

[94] James E. Mitchell, Ph.D. and John B. Jessen, Ph.D., "Interrogation and Coercive Physical Pressures: A Quick Overview," February 2005. This apparently is a derivative of a paper prepared at the time of the June 2004 DO review, "Using Coercive Pressure in Interrogation of High Value Targets."

[95] They continue: "As in all cases of exploitation, the interrogator seeks to induce an exploitable mental state and then take advantage of the opening to further manipulate the detainee. In many cases, coercive

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Missing from this perspective was any question about just how many elements were necessary for a successful "orchestration." The assumption was that a gifted interrogator would know best; and the implicit message was that this art form could not be objectively analyzed. Indeed, by this time their methodology was more nuanced, in stark contrast to the rapid escalation and indiscriminate repetitions of early interrogations. Still, there remained a need to look more objectively for the least intrusive way to gain cooperation.

Ultimately the Inspector General departed from the original recommendation in favor of an entirely "outside" review, by a "blue ribbon" panel of individuals of some political prominence. In the wake of Abu Ghraib, and in the context of intense media attention, suitable and willing candidates were not easily obtained. Eventually John Hamre, Deputy Defense Secretary in the Clinton Administration, and Gardner Peckham, an advisor to then House Speaker Newt Gingrich, agreed to undertake a primarily interview-based review. Without the requisite background for the previously planned technical analysis, their task became a relatively broad review of overall program effectiveness.

In separate final reports, Peckham and Hamre both endorsed the RDG program, but differed on the question of interrogation techniques. Peckham noted that the Inspector General's principal concern was the waterboard, for which it thought there were equally viable alternatives; that RDG did not consider the waterboard effective, and "contended that use of the waterboard on lesser AQ [al-Qa'ida] operatives [than AZ and KSM] would not necessarily produce more or better intelligence;" and that "OMS is candid in its discomfort with this technique." He then concluded:

> "It is possible that other techniques would be as effective as the waterboard, but that has not been demonstrated. Until it is, I believe that the waterboard should continue to be available in the EIT arsenal." [96]

Hamre was less definitive. Noting that there was no objective yardstick by which to judge EIT effectiveness, he concluded that "the data does suggest that EITs, when incorporated into a comprehensive program based on sound underlying intelligence and analysis, did provide useful intelligence products." However, "there is no objective

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interrogation techniques are used initially to induce a sense of despair, but then discontinued when the detainee seeks to find a way out of his current predicament and becomes susceptible to other influence techniques. Interrogators then offer the detainee hope, and subsequently exploit this hope for intelligence purposes. In other words, physical techniques, if used, are most effective when employed to create an exploitable state of mind, rather than force rote compliance"

[96] Gardner Peckham to DCI Porter Goss, "Assessment of EITs Effectiveness," 2 September 2005.

independent basis to assess when EITs other than conditioning EITs [sleep deprivation, dietary manipulation] are required.[97]

The August 2004 DoJ opinion on using the waterboard on Janat Gul coincided with a much more extensive review of the legality of nearly all interrogation techniques requested by the Agency in the wake of Abu Graib and associated Presidential statements. As part of this review, Justice attorneys held extensive sessions with OMS, and requested and were provided with written OMS critiques prepared for the May 2004 Inspector General report. This DoJ review (discussed below) spanned almost a full year, and culminated in May 2005 memoranda that in essence reaffirmed their 2002 ruling (including the legality of the waterboard). Unlike 2002, this memorandum relied heavily and explicitly on OMS input, and underscored as never before an indispensable OMS role in legitimizing the program.

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Within weeks of receipt of the May 2005 DOJ opinion, another possible candidate for the waterboard presented. This was Abu Faraj al-Libi [redacted] captured by the Pakistanis and transferred to the Agency in May 2005. Initially believed one of the most senior al-Qa'ida leaders, Faraj twice was subjected to periods of enhanced interrogation measures, with seemingly limited success. When the possibility of waterboard use then was raised, OMS advised RDG that it would participate only if there was real evidence that he had critical, time perishable information. This quickly led to a rumor that Medical was withdrawing support from the program, which soon reached senior Agency management. [redacted]MS (since October 2004, DB) was requested to explain the OMS position to the Agency's Director of Support (DS). DS asked whether it would be sufficient if OGC and DO assured OMS that waterboard use was warranted; the answer was no: OMS would have to hear the evidence directly.[98] A definitive impasse was never reached, however, because senior Agency management decided that in this case the waterboard was unnecessary.

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Faraj al-Libi probably marks the final consideration of waterboard use. With the passage of the Detainee Treatment Act of 2005, "Military Commissions Act" of 2006, and application of Common Article 3 of the Geneva Conventions, the Agency again asked DOJ for a ruling on the legality of several enhanced interrogation measures. The waterboard was not on the newly proposed list, and it is unlikely to be on any future request. The Military Commissions Act (discussed below) made illegal any interrogation techniques that caused "serious" pain and suffering (vice "severe," previously). While the case may be arguable, the waterboard may not have survived that test.[99]

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[97] John Hamre to DCI Porter Goss, "Response to request from Director for Assessment of EIT effectiveness," 25 September 2005

[98] OMS did not think the case was there. Abu Faraj was believed once to have known the whereabouts of Osama bin Ladin and al-Zawahiri. Given his publicly announced capture many weeks before, any information he held no longer seemed perishable.

[99] A different type of waterboard discussion may continue. The three HVDs subjected to the waterboard were interviewed by the ICRC after their transfer to Guantánamo. Their stories were highlighted in the

The waterboard, despite its role as a symbol of Agency torture, did not prove as psychologically overwhelming as received SERE wisdom indicated, and it certainly was not irresistible—even in the face of a more aggressive, invasive, and potentially dangerous Agency methodology than used in SERE. It also was not intrinsically painful. There must have been physical discomfort from the occasional associated retching, but both AZ and KSM complained to the ICRC only of the pain of the restraining straps. Even the retching would have been eliminated had true SERE technique been employed. In short, the waterboard was primarily a psychological measure. That said, had the true limits of SERE use been known to OMS at the outset, its application would have been limited to a few (ineffective) applications, leaving some to believe that more applications would achieve the goal. Even very limited used may not have avoided the devastating public penalty ultimately paid by the Agency for its use.

As previously noted, an unrealistic expectation that waterboard applications would eventually "succeed" informed the DoJ guidance, and underpinned its extensive use with AZ and KSM. Though not a medical question, per se, OMS came to believe that the waterboard's impact as an interrogation tool was just the opposite. The waterboard experience was miserable but the effect not necessarily cumulative (as was sleep deprivation). Once the shock of the initial applications had passed, KSM knew what was coming and developed coping strategies; after so many applications, he also had no reason to believe anything worse was likely to follow. In essence less coercive measures were likely to produce perishable information at least as quickly. To OMS this undermined the legal justification for repetitive use.

DoJ also determined that the waterboard was legal because it was not intended to threaten death (i.e., as in a mock execution). Within OMS, this interpretation eventually was controversial. The fact that thousands of SERE trainees had safely undergone the waterboard would not be known to detainees, who in addition were in a hostile environment vice training. Setting aside interrogator intent, a *lengthy* initial application could have appeared to threaten death. In theory, a detainee would have been desensitized before this happened through applications lasting just a few seconds, which was Agency practice. Eventually, the detainee would realize that he could handle the longer applications. Additionally, most detainees quickly discerned—because of the ongoing medical attention—that there was no intent to seriously harm them. As a practical matter, all this is moot since by the time questions arose the waterboard was no longer in use. In the unlikely event that the waterboard is again considered a viable option, the question warrants further thought.

ICRC report to the Agency, which DCIA Hayden then discussed with Congressional Oversight Committees. At the time of this writing [June 2007] the Committees had ask for detailed analyses of the intelligence obtained before and after enhanced measures were employed, i.e., the question originally asked both by OMS and the Inspector General in 2003 and 2004.

HVDs,[100] EITs, and OMS Guidelines

When the OMS Guidelines in preparation at the time of KSM's interrogation were completed, CTC/LGL requested they not be released: new DCI approval would be required, and he had just issued his own guidelines. OMS countered that its guidance was consistent with that of the DCI and provided a concise source of information needed by OMS field personnel. CTC/LGL relented, so long as "draft" was added to the title. The first week in April, 2003, the 9-page "Draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations" first went to the field.

This first issued OMS Guidelines began with a short statement of the SERE origins, DoJ sanction, and the psychological underpinnings of the program, then enumerated currently used interrogation techniques ("standard" and "enhanced"). Reference points and limits were provided for ambient temperatures, noise levels, sleep deprivation, standing in shackles, and the use of the confinement box. Nearly a third of the text was devoted to the waterboard, beginning with a description which explicitly underscored the difference between Agency and SERE usage. An estimate was given of apparently safe levels of exposure—based on the limited experience to date—and a requirement levied for extensive medical documentation of any future waterboard use. Medical contraindications also were listed, including serious heart or lung disease, obstructive airway disease, and respiratory compromise from morbid obesity. Though laryngospasm had not been encountered in the SERE program OMS believed it to be the most serious theoretical risk, so continued waterboard use was barred if previous applications were associated with any hint of impending respiratory compromise, such as hoarseness, cough, wheezing, stridor, or difficulty clearing the airway. Finally, a working draft assertion, prior to KSM, that "it would appear that subjects cannot maintain…resistance…more than a few days" was replaced with the new observation that "SERE trainers are said to believe that subjects are unable to maintain psychological resistance to this technique for more than a few days, but our experience suggests otherwise."

The KSM interrogations were only the beginning of what proved to be the busiest and most productive eighteen-months in the history of the RDG program. In a period marked by the US-led invasion of Iraq (March 2003) and major terrorist bombings in Indonesia (August 2003),[101] [redacted] terrorists came into Agency hands, including [redacted] of sufficient importance to warrant extended interrogation. The experience monitoring these interrogations proved instructive and other sources of information were also explored. Detailed Ft. Bragg SERE protocols were obtained, additional conversations were held with both Army and Navy SERE psychologists, and OMS physicians and psychologists observed courses at both Ft. Bragg and San Diego. In San Diego, DC/MS even underwent the waterboard.

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[100] Over time High Value Targets (HVTs) came to be known as High Value Detainees (HVDs)

[101] E.g., the Jakarta Marriott, killing 10 and wounding 150.

Ten new RDG detainees were interrogated between April and August 2003 with eight subjected to enhanced measures. The EIT mainstay, post-KSM, was standing sleep deprivation (lasting from one to four days), punctuated by sessions which routinely included attention slaps, walling and water dousing.[102] This approach generally achieved cooperation within a week. A few detainees were confined briefly in large and small boxes but, as with AZ and Nashiri, this added little if anything to the process and after September confinement boxes no longer were used.

In addition to cooperation, standing sleep deprivation produced the first medical complications seen in the RDG program. Several days of standing led to a slowly ascending edema of the lower legs, requiring that ankle shackles be loosened. In a few cases, the edema approached the level of the knee, in which case medical personnel required the detainee be seated, with the legs elevated, allowing alleviation of the edema while sleep deprivation continued. Occasionally, in addition to the edema a detainee developed lower limb tenderness and erythema, findings initially not easily distinguishable from cellulitis or venous thrombosis. This typically was associated with pre-existing abrasions from shackling at the time of initial rendition. At first these cases were treated with antibiotics or anticoagulants, but upon being seated detainee recovery was so fast that a thrombotic or infectious phenomenon was ruled out, and medications could be discontinued.

There was an early concern that standing detainees would fall asleep and shift excessive weight onto their arms, but this did not become an issue even after several days of standing. Overwhelmingly the detainees simply continued to stand and periodically move around a little. Those who nodded always startled themselves back awake. This resilience actually deprived them of an effective counter-measure, because had they simply allowed themselves to "collapse" their weight onto their arms, the standing would have been discontinued.[103]

In its early years—though unknown to OMS in 2003—the Agency regarded forced interrogational standing as dangerous. A widely-disseminated 1956 study asserted that the resulting edema soon led to circulatory and renal failure, and psychosis.[104]

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[102] Water dousing (often soaking), though newly prominent among the interrogation techniques, had been addressed in the first issued OMS Guidelines. Most often water was simply splashed or hosed onto the detainee, but in the most extreme version the detainee was made to lie down on a plastic sheet, with water poured over him for 10-15 minutes. A psychologist and PA had to be present, and the room temperature at least 70°. Consistent with SERE practice, doused detainees had to be dry before being placed in spaces with ambient temperatures less than 78°. See also Office of the Inspector General, "Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," 7 May 2004, p. 76

[103] This suggestion is found in Agency commentary on detention as early as the 1950s.

[104] "Many men can withstand the pain of long standing, but sooner or later all men succumb to the circulatory failure it produces. After 18 to 24 hours of continuous standing, there is an accumulation of fluid in the tissues of the legs. This dependent 'edema' is produced by fluid from the blood vessels. The ankles and feet of the prisoner swell to twice their normal circumference. The edema may rise up the legs

Detainees in the RDG program provided no evidence for this belief. Their generally benign record probably is attributable to there being enough slack in the shackling to allow a little movement and the periodic breaks occasioned by sessions using other interrogation measures. In all cases, once allowed to sit (and sleep), their recovery was rapid and complete.[105]

Whether standing added anything to simple sleep deprivation was a point of some discussion. Simple sleep deprivation had not been effective during AZ's first interrogation, and later detainees at least initially all began in a standing position. The fatigue of standing presumably heightened the effect of the sleep deprivation, but to what degree remains unknown.

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OMS guidelines also increasingly addressed detainee health in the post interrogation phase. As the number of post-interrogation detainees grew, with no apparent prospect of transfer elsewhere, OMS had turned to the Federal prison system for insight into long-term prison care. In June 2003 the (b)(6) Bureau of Prisons was invited to Headquarters to discuss problems of long-term confinement, and in mid-July [redacted]MS, [redacted]MS, and [redacted]MHD (accompanied by two senior RDG officers) visited the Administrative Maximum (ADX) "supermax" facility in Florence, Colorado, which then held the twenty-two terrorists imprisoned in the Federal system. The ADX staff provided a comprehensive tour and briefing that gave a good feel for the circumstances of detention, the medical care provided, and their experience with terrorist prisoners.[106] OMS learned their protocols for dealing with hunger strikes, medical

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as high as the middle of the thighs. The skin becomes tense and intensely painful. Large blisters develop which break and exude watery serum. The accumulation of the body fluid in the legs produces an impairment of the circulation. The heart rate increases and fainting may occur. Eventually there is a renal shutdown, and urine production ceases. The prisoner becomes thirsty, and may drink a good deal of water, which is not excreted, but adds to the edema of the legs. Men have been known to remain standing for periods as long as several days. Ultimately they usually develop a delirious state, characterized by disorientation, fear, delusions, and visual hallucinations. The psychosis is produced by a combination of circulatory impairment, lack of sleep, and uremia." "Communist Control Techniques," 2 April 1956. This was an OTS-sponsored QKHILLTOP study. This text appears almost verbatim in a published version of this article, Lawrence E. Hinkle, Jr., MD and Harold G. Wolff, MD, "Communist Interrogation and Indoctrination of 'Enemies of the States,' Analysis of Methods Used by the Communist State Policy (A Special Report)," *A.M.A. Archives of Neurology and Psychiatry* 76 (1956), pp. 134-135. [The published text read, "This dependent edema is produced by the extravasation of fluid from the blood vessels."] The latter is verbatim from an OTR/A&E Staff paper on "Brainwashing From a Psychological Viewpoint," February 1956; which began with a June 1955 study that discussed standing stress positions without the medical analysis.

[105] The 1956 study said that the KGB required prisoners to stand or otherwise hold fixed positions until it "produces excruciating pain" which the authors considered "a form of physical torture, in spite of the fact that the prisoners and KGB officers alike do not ordinarily perceive it as such." As noted, HVDs subjected to standing sleep deprivation were not in a fixed position, and did not report an associated pain.

[106] All twenty-two of these terrorists were imprisoned for activities directly tied to bombings. At an average age of 41, there were somewhat older than our population, and on average had been in prison for

complaints, and routine evaluations; and how they minimized the risk that personal effects such as spectacles and toothbrushes would be made into weapons.

Several revisions of the OMS Guidelines were prepared during the summer of 2003, culminating with a 12-page September 2003 issuance.[107] These guidelines gave guidance on responding to the recently noted complications and required detailed documentation of the circumstances of standing sleep deprivation. A new section was added on "Post-Interrogation Detention," which covered exam frequency,[108] diet and dietary supplements, height-for-weight, hunger strikes, hygiene, and examination documentation and frequency. Previous guidance on intake examinations was codified and expanded, e.g., to include laboratory studies such as CBC, Hepatitis B and C, HIV, and a chemistry panel.

Five months later, in February 2004, an expanded version of "OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention" (18 pages, plus a 4-page appendix)[109] was issued. A Part II on "Psychological and Psychiatric Support to Detainee Interrogations" (previously discussed) also was disseminated. Among other things these Guidelines now included guidance on disruptive behavior during renditions (including the use—never required—of diazepam and haloperidol), vision problems, dental care, and more on "hunger strikes and food refusal." A newly-added appendix succinctly outlined the basis for the medical limitations on the various interrogation techniques.

This issuance also reflected a December 2003 change in CTC instructions, which reduced the upper limit of "standard" sleep deprivation from 72 hours to 48, and "enhanced" sleep deprivation from 264 hours (with an 8-hour sleep break at 180 hours) to 180 hours. This change was prompted by the first instance of a sleep-deprived detainee hallucinating.[110] In October, 55-year-old Arsala Khan—one the oldest detainees ever held—began to "see" dogs attacking his family. Khan previously had been subjected to periods of 37 and 56 hours without sleep without complications, but this hallucination came after only about 21 hours. Since none of this sleep deprivation was at "enhanced"

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just under six years. In general they were respectful toward the staff (though regularly tested the system), but prior to transfer to Florence two-thirds had been involved in prison violence, nine had threatened prison staff, and one was suspected of murder. About a third had made suicidal gestures; 12 had initiated hunger strikes (5 were fed involuntarily by N-G tube). Extraordinarily modest, they for a long time refused recreation because of the prerequisite body search, and showered wearing underpants. With the exception of one elderly man, they were in good physical shape, and—remarkably—during psychological interviews or testing showed no diagnosable pathology.

[107] "Draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations," September 4, 2003 [12 pp]

[108] This formally corrected a significant deficit in medical documentation, [redacted] initially had a no local records policy. In practice this had been corrected in January 2003 through cable reporting.

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[109] Issued 27 February 2004.

[110] The previous spring, a detainee claimed to have hallucinations, but careful psychological evaluation at the time proved this to be feigned.

levels, there was no on-site medical monitoring. When the hallucination was reported to Headquarters, further sleep deprivation was barred. Later the "standard" limit was reduced. The change in the "enhanced" upper limit also reflected the program experience that it had been unnecessary to keep anyone awake even as long as 180 hours. (Only three of some 25 detainees eventually subjected to sleep deprivation even were kept awake over 96 hours.)

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Providing medical and psychological coverage for both new interrogations and the growing number of widely dispersed detainees posed an increasing challenge, especially given the separate manpower demands in [redacted]
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[111] At closure [redacted] (b)(1) (b)(3) NatSecAct detainees had been held there, not all at the same time: [redacted]
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late 2003 most physician coverage was handled by a headquarters-based physician newly assigned near-fulltime responsibility for program support. All psychological staff support was provided directly from Headquarters, as was most of the extensive demand to accompany rendition flights, including inter-facility movement.

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However, within weeks the Supreme Court announced it woul (b)(1) (b)(3) NatSecAct consider a case which could have mandated court access to all Guantánamo-held detainees.[113]

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The spring 2003 briefings to the White House, NSC and Hill on the Agency's expanded use of EITS led to reassurances about the legality of and continued support for the program, which still was generating over half the reportable intelligence on al-Qa'ida. However, the national context changed abruptly a year later when shocking photographs of prisoner abuse at Abu Ghraib prison in Iraq were published in April 2004.[116] The international outrage that followed prompted White House and Pentagon condemnations of the abusive practices and investigations of detainee treatment at both Abu Ghraib and Guantánamo Bay. The Agency, while not directly involved, again sought DoJ re-validation.

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[113] *Rasul v. Bush*, on 29 June 2004, reversed a District Court decision, and held that the U.S. court system had the right to decide whether foreign nationals at Guantánamo were rightfully imprisoned. The case had been appealed to the Supreme Court the previous September, and the case heard on 20 April.

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The request to DoJ was more reflective of caution than a desire to limit the successful RDG program, especially in view of continuing high profile terrorist attacks. In March 2004 the Madrid bombings killed 191 and in May the first of a series of nine gruesome beheadings took place in Iraq. Each of the latter cases, which extended until October, followed the same gruesome pattern: a terrorist kidnapping, followed by impossible demands, videoed pleas from the victim, and soon thereafter a beheading, the video of which was released to the media.

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About June 2004 senior al-Qa'ida operative Janat Gul was captured by [redacted] [redacted] later transferred to the RDG program, prompting Agency requests for a new ruling on several EITs. In response to specific questions, DoJ affirmed the legality of dietary manipulation, nudity, water dousing, abdominal slap—all not previously specifically addressed—and the waterboard. In each instance, these were held not to violate U.S. law, the Constitution, or any treaty obligation.[117] As previously, use was explicitly preconditioned on medical and psychological evaluation and the presence of on-site medical monitoring. It was these approvals that led to the OMS-RDG discussions that further limited the extent of allowable waterboard use (previously discussed). Gul's interrogation—like others post-KSM—relied heavily on sleep deprivation, which for the second (and final) time in the program was associated with a hallucination. On the fifth day without sleep, Gul began to hear voices. Medical personnel intervened, and he was allowed to sleep, which ended the symptoms.

At the end of 2004, OMS issued a new expanded version (27 pages + 7-page appendix) of its Guidelines. Unexpectedly, this particular version of the Guidelines became a foundation of the next issued DoJ opinions (in May 2005) on the legality of enhanced interrogation techniques. Among other changes, the December 2004 version reflected a summer 2004 RDG decision to abandon the previous distinction between "standard" and "enhanced" interrogation techniques; there now was a single listing of approvable techniques. Additionally, the Guidelines followed RDG in listing some interrogation techniques separately as "conditions of confinement." These included such things as diapering/nudity, shaving, white noise, and continuous light or darkness. Exposure to "cool environments"–previously listed, but never used—was dropped

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[117] DoJ to John Rizzo, Acting General Counsel, 6 August 2004; DoJ to John Rizzo, Acting General Counsel, 26 August 2004.

altogether. Other revisions incorporated the new limits on waterboard use, expanded the discussions of sleep deprivation and recovery, and specified immunization protocols.

The new Guidelines also reflected some insights gained when OMS psychologists began attending conferences of the National Commission on Correctional Health Care (NCCHC) in the summer of 2004. These included a section on "restraint and sedation of violent detainees"—which fortunately never had any application within the RDG setting. Finally, new references were provided, including the Federal Bureau of Prisons website (which had clinical practice guidelines), the NCCHC's regularly issued *Standards for Health Service in Prisons,* and Michael Puisis, *Clinical Practice in Correctional Medicine* (1998).

An issue of recurring concern was how to deal with a detainee medical emergency. (b)(1)

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[118] "OMS Guidelines on Medical and Psychological Support to Detainee Renditions, Interrogation, and Detention," September 2005 [29 pp + 7 pp appendix]

Problems of Detention

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By 2007 a total of 97 detainees had been part of the RDG program. Prior to RDG assuming control, [redacted][119] About half the 97 RDG detainees came into Agency hands in 2003, and a fourth in 2004. In the final two years prior to the transfer of remaining detainees to Guantánamo Bay in September 2006, only 5-6 new detainees entered the program, with only two subjected to enhanced measures.

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When possible, RDG arranged to transfer detainees no longer of intelligence value to the U.S. military, or render them to another country. Despite new arrivals, this effort reduced the total number of detainees in Agency control from [redacted] at end of 2003, to just [redacted] in the spring of 2004, and just [redacted] at the beginning of 2005. This figure remained relatively constant for the next year, until an accelerated effort during 2006 reduced the number remaining for transfer to Guantánamo to 14.

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Viewed differently, about 2/3 of detainees coming into Agency hands prior to October 2004 had been transferred out by circa the end of 2004; their detentions had ranged from a month to almost two years, probably averaging not much more than a year. A large majority of the detainees *not* transferred out of Agency hands by the end of 2004 continued to be held for almost two more years. Their overall detention probably averaged about three years, and as true long-term detainees they presented a different set of medical challenges.

OMS thought of the detainee experience as divided into three phases: rendition and initial interrogation, sustained debriefing, and long-term detention. With the first two phases typically lasting only a few weeks to a few months, by far the greatest amount of a detainee's time was spent simply in detention.[120] With the sharp late-2004 decline in new arrivals, the medical role thus became almost exclusively attending to long-term detainees.

Agency detainees were, as a group, basically young and healthy. Given bi-monthly or quarterly medical check ups (more often if indicated), a healthful diet, vitamins, vaccines, adequate rest, and some opportunity to exercise, most eventually were in better shape than when they came into Agency custody. Some were even willing to comment that they looked fitter than they had in years.

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[120] RDG characterized things similarly: an interrogation/exploitation phase lasted 1-10 weeks, with the most intense period rarely exceeding two weeks; a second, transition phase usually lasting two to three months during which the detainees cooperation was validated; and a third, debriefing phase which lasted from two to several months and in rare cases—such as AZ—for as long as three years.

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A few detainees arrived with existing injuries, though none in as serious condition as AZ. Ahmed Guleed [redacted] had sustained a GSW several months prior to capture, and arrived at [redacted] with a colostomy and frozen left elbow. Two detainees arrived [redacted] with malleolar fractures sustained jumping from a high wall. Another detainee arrived with a broken finger. All required follow-up care and none were subjected to stressful interrogation either initially or later. The fracture group soon was transferred elsewhere, but Guleed's colostomy was successfully maintained for over two years before circumstances allowed a revision to be arranged. In the interim, he received professional guidance on physical therapy to restore motion in his left elbow.

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Medically, of the nearly 100 detainees evaluated, none was HIV-positive, only three were hepatitis B and two hepatitis C antigen positive. One arrived with a sexually-*transmitted disease—a chancroid—inflicted, he said, by a genii (djin). Most complaints* while in detention were for relatively minor ailments, such as headaches, mild musculo-skeletal symptoms, rashes, gastrointestinal upsets, or an occasional pharyngitis. Eventually a few dental problems arose, treated by an RDG contract dentist who from early 2004 periodically flew to detention sites to provide both routine and focused care. Only a single dental emergency arose, in 2006, [redacted] Basic vision checks were performed by OMS personnel, and prison-safe glasses obtained. AZ initially preferred to wear a patch over his left eye socket, but eventually requested an artificial eye; this was obtained, a near perfect match to his good eye.

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Over time, non-emergency issues arose which required capabilities beyond that available at the detention sites. Guleed's colostomy needed to be reversed; Gul [redacted] needed a biopsy for an enlarging thyroid; al-Hasawi [redacted] had hemorrhoids and a rectal prolapse; three detainees required endoscopy for GERD symptoms; and liver biopsies were indicated for those with chronic hepatitis B or C.

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OMS once hoped the Department of Defense could provide this specialized care. When several detainees were transferred to [redacted] Guantánamo Bay in early 2004, a test case presented. [redacted] (b)(1) (b)(1)(b)(3) NatSecAct (b)(3) NatSecAct [redacted] As this concern was being addressed, the issue became moot. The pending Supreme Court decision that could have mandated access to all Guantánamo detainees led to the closure [redacted] (b)(1) (b)(3) NatSecAct

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While pursuing the DOD option, RDG and OMS also evaluated over a dozen third-country alternatives. A combination of substandard medical care and/or concerns about media exposure and internal politics had ruled out all of those initially considered.

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Attending to the psychological well-being of detainees was at least as challenging as dealing with their physical needs. The impact of sustained isolation was the primary problem and proved more psychologically challenging than had the interrogations. By design, no contact with other detainees was allowed in Agency detention facilities and continuous white noise prevented them from hearing one another. Though physically comparable to modern U.S. prisons [redacted] the detainee cells nonetheless were small and windowless.

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[121] On the basis of blood tests, three of the detainees, including the subject with rectal prolapse once were considered candidates for liver biopsy. Of these, one declined to be biopsied, one was transferred [redacted] [redacted] before a biopsy could be arranged, and further testing of the third eliminated the need.

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Initially, of course, detainees had weeks and sometimes months of frequent, often intense contact with Agency interrogators and debriefers. But as this phase ended, detainees eventually were left without the intellectual stimulation such contact afforded. Initial attempts to fill this void included "homework" (even when no intelligence requirement existed), the provision of books and other reading material, and mandatory staff contacts. At the extreme, KSM was invited to present staff lectures on various subjects.

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OMS concerns about the effects of long-term detention led to an acceleration of RDG efforts to provide more stimulation to the detainees. (These concerns were shared by RDG personnel working directly with the detainees, and by D/NCS, former Chief of CTC). This included the provision of videos and games (eventually including hand-held computer games), and the implementation of "social" or "rapport-building" sessions, during which staffers might play cards or other games with a detainee or hold informal philosophical discussions. In this setting, many detainees came to view some of the staff, even prior interrogators, as their "friends."

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Throughout the years of the RDG program OMS psychologists and psychiatrists made at least quarterly trips to each facility, and conducted extensive interviews with every detainee. Notably, in view of the terrorist behavior, at intake no detainee had a diagnosable mental disorder, not excepting such Axis II disorders as anti-social

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personality.[123] (This was consistent with the findings on terrorists held in the Federal prison system.) Some eventually developed adjustment problems, and at least two requested and were provided with anti-depressants. Another asked for Prozac, which he had taken previously, and was sure it would make him feel better. It didn't, so the Prozac was discontinued. Particular effort was made to identify signs of post-traumatic stress disorder (PTSD). Notably, even among those subjected to the most intense coercive measures, there were no indications of the emergence of PTSD.

OMS practice regarding the treatment of detainees who were having difficulties with their situation was to work with RDG to ameliorate conditions as much as possible within security bounds. Although at times CTC managers were frustrated by OMS unwillingness to involuntarily medicate detainees who were "acting out," medications were offered only for bona fide medical indications and with the prior consent of the detainee. This mirrored the Federal Bureau of Prisons policy on involuntary medication.

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At least two detainees did appear to feign mental illnesses. One, [redacted] was concerned that [redacted] guards would learn of his links [redacted] [redacted] He suddenly stopped speaking and isolated himself from the others in his group cell [redacted] However, he remained visibly attuned to everything going on around him, and was appropriately attentive to his activities of daily living. When he was discretely reassured that his "secret" was safe with us, he suddenly was able to express appreciation. On transfer to an entirely U.S. manned facility, his symptoms cleared.

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The second case was Firas al-Yemeni [redacted] who once had passed a kidney stone. He began hoarding medications, self-inducing vomiting, defecating on the floor and crawling through his feces. At times he appeared to fake his symptoms, and his endoscopy had been normal. The best judgment was that most of his symptoms were either psychosomatic or factitious. Eventually he was transferred out of the RDG program, and his medical care assumed by the recipient country.

From the time of AZ's capture there was concern that a martydom-oriented detainee would deliberately injure himself, or attempt suicide. Accordingly, all detainees were intensively monitored during their initial interrogations and had video-monitoring of their cells throughout their detention. Aside from a rare refusal to eat or drink, however, most detainees were attentive to their person health and no seriously self-destructive behavior was evident. One detainee—Majid Khan [redacted]—twice made scratches across his wrists (not requiring suturing) when he felt he was not getting enough attention

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[123] [redacted] In 2006 author Ron Suskind reported, in a much repeated claim, that at the time of capture AZ was found to have a serious dissociative disorder, a diagnosis inferred from AZ's diaries, which were written using several personas. In reality, this was an entirely literary device, without psychiatric overtones. Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (New York City: Simon & Shuster, 2006), pp. 95-100.

from the facility chief. Another detainee was found to woven a noose from clothe in his cell.

Fewer than five detainees ever refused food. OMS (and RDG) policy—which was based on that of the Bureau of Prisons—allowed a hunger strike to continue unless there was some apparent impact on the detainee's health, or his weight fell to less than 90% of average for height. If one of these thresholds was reached, the health risks were explained. If a detainee still continued to refuse food, he was fed through an NG tube. Tube feeding would have been accomplished involuntarily if necessary, but the few who required it were compliant and often assisted with the procedure. Typically, hunger strikes ended soon after these feedings began.

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One detainee, of some later notoriety, ended a hunger strike as soon as an NG tube first was laid out and lubricated. Khaled al-Masri was a German citizen [redacted], transferred to the Agency and rendered [redacted]

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Subsequently al-Masri went public with an account embraced by the press and the ACLU, which variously alleged imprisonment [redacted] injection with drugs (including rectally), forced feeding, beatings, and sexual abuse, none of which was actually true. He had never even been interrogated, much less abused. An ACLU-supported al-Masri lawsuit against the Agency eventually was disallowed by the courts, and later he was arrested in Germany on a charge of arson—the result, his lawyer said, of a "nervous breakdown attributable to the torture he had endured in CIA custody".[124]

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OMS (and Bureau of Prisons) policy on forced feedings was directly counter to that of the World Medical Association, the American Medical Association, and most medical human rights groups. These groups held that the right to patient self-determination prevailed over all other considerations. Within OMS, there was never any consideration given to allowing a detainee to starve himself to death, or otherwise kill himself. As within the Federal prison system, RDG detention facilities were carefully designed to be as suicide-proof as possible. Suicidal behavior, should it have occurred, would have been seen as a reflection of the psychiatric stresses associated with incarceration and an uncertain future. Moreover, it was clear that had a detainee managed to kill himself any commendation for the Agency commitment to self-determination would have been lost in the demands for an immediate investigation.

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[124] The first of scores of article on the al-Masri case was "German's Claim of Kidnapping Brings Investigation of U.S. Link," *New York Times*, 9 January 2005. His arson arrest and involuntary admission to a psychiatric ward was reported in, "German who claimed to be CIA torture victim detained on suspicion of arson," *International Herald Tribune*, 17 May 2007. A particularly trusting article, which also repeated the rectal suppository allegation, was Jane Mayer, "The Black Sites," *The New Yorker*, 13 August 2007. Mayer characterized al-Masri as "one of the more credible sources on the black-site program"

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[redacted] ABC News began a series of related reports—which also won their authors a Pulitzer. These reports enumerated and briefly described six "enhanced interrogation techniques" said to be used by the Agency. Four techniques were correctly described: the attention grab, attention slap, the belly slap, and "long time standing." "Standing" for more than 40 hours, and associated sleep deprivation, was said

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to be "effective." A fifth identified technique was "the cold cell" in which a prisoner was said to be kept standing at a temperature near 50 degrees while being doused with cold water. This claim was only partially correct: standing and dousing were done, but not in a cold room. The sixth identified technique was the previously reported "water boarding," though now described as binding the detainee to a board, wrapping cellophane around his face, and then pouring on water.

This waterboard treatment was said to result in "almost instant pleas to bring the treatment to a halt." Ibn Shaykh al Libbi was said to have been broken by it after two weeks of progressively harsher techniques had failed. CIA officers subjected to the waterboard during trainings were said to last an average of 14 seconds. AZ began cooperating after 31 seconds, while KSM had impressed interrogators by lasting between 2 and 2½ minutes.

All but one of the 12 high value targets held to date were said to have required waterboarding. The exception was Ramzi bin al-Shibh, who reportedly broke down after walking past the cell in which KSM was held. [redacted]

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Despite the Pulitzer, and the frequency with which other media sources repeated ABC claims, at best they again reflected poor guesswork by sources with no direct knowledge of the program. There never was a "cold room" technique. Cellophane was never part of the waterboard.[134] Only three (not eleven) detainees had been on the waterboard. Shaykh al Libbi never was on the waterboard. Neither AZ nor KSM "broke" on the waterboard. While AZ once had water applied for 30 seconds, KSM never had an application exceeding 40 seconds. [redacted]

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[133] "CIA's Harsh Interrogation Techniques Described," ABCNews, 18 November 2005.

[134] Misreporting about the waterboard was common. For at least a year after first reporting of waterbaord use, the *New York Times* described it as involving literal submersion under water. The first to correctly characterize the technique was *Newsweek*. Eventually the *Chicago Tribune* carried the rather detailed description by a Navy SEAL who had experienced the technique himself, and who also reflected conventional SERE wisdom in saying it was "instantly effective on 100 percent of Navy SEALs." See "A Tortured Debate," *Newsweek*, 21 June 2004; "The Debate Over Torture," *Newsweek*, 21 November 2005; "Spilling Al Qaeda's Secrets," *Chicago Tribune*, 28 December 2005

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[redacted] Khaled al-Masri—whose allegations of drugging, torture, and forced feeding were all fabricated—[redacted] (b)(1) (b)(3) NatSecAct

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Beyond the fiscal costs, these closures and resulting moves took a visible toll on the detainees. For them, movement was very stressful because of the associated uncertainties. Attending medical personnel generally talked detainees through this process, emphasizing that the change was not a reflection on their behavior (i.e., it wasn't punitive), but rather was compelled by outside factors. Nonetheless, the associated anxiety often triggered some depression, occasionally requiring treatment. The Agency later was faulted for subjecting detainees to multiple moves, but this was not by design. Had circumstances allowed, most detainees would have gone from an initial interrogation/debriefing site, to a final-long term detention facility. Detainees of lesser value would have been turned over to the DoD or returned to their home country.

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Ethics

One group energized by media exposés and human rights reports were those concerned with the ethics of medical participation in detainee programs, including the role of psychologists. In the 18-month period from July 2004 to December 2005, the *New England Journal of Medicine* carried five different articles touching on the subject, ranging from "Doctors and Torture" to "Glimpses of Guantanamo—Medical Ethics and the War on Terror."[141] A particularly pointed article under the principal authorship of the president of Physicians for Human Rights also appeared in *JAMA* on "Coercive U.S. Interrogation Policies: A Challenge to Medical Ethics" (September 2005).[142]

The thrust of these articles—most of which were focused on the more visible and widely-reported practices of U.S. military personnel—was that there was little or no place for medical personnel or psychologists in interrogations, and especially those involving coercive techniques or designed with medical input on detainee vulnerabilities.[143] The interrogation techniques widely reported in the press violated the patient-centric ethic which should govern all medical practice. If not outright torture, the interrogation techniques were cruel, inhuman and degrading, and thus illegal under international and "humanitarian" law.

In general OMS personnel long since had resolved personal ethical concerns by the time such commentaries appeared in 2004 and 2005. The Office believed ethical considerations were entirely personal, so from the outset made participation in the RDG program voluntary. Withdrawal without penalty was allowed at any time. The 2002 DoJ guidance was the foundation of most decisions to become involved, but program experience reinforced the initial commitment. With the exception of the waterboard—last used in March 2003, and by late 2004 unlikely to be used again—the actual application of enhanced techniques had been much more modest than the press image, and reassuringly free of enduring physical or psychological effects. Collectively, these techniques had been dramatically successful in producing indispensable intelligence not otherwise obtainable. Though often discounted in the press, the information that flowed out of detainee interrogations and debriefings had led to the capture of other key al-Qa'ida players and the disruption of several planned attacks. Lives unquestionably were saved.

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[141] Robert J. Lifton, MD, "Doctors and Torture," *NEJM* 351(5):415-416 (29 July 2004); M. Gregg Bloche and Jonathan H. Marks, "When Doctors Go to War," *NEJM* 352(1):3-6 (6 January 2005); George Annas, JD, MPH, "Unspeakably Cruel—Torture, Medical Ethics, and the Law," NEJM 352(20):2127-2131 (19 May 2005); M. Gregg Bloche, MD, JD and Jonathan H. Marks, "Doctors and Interrogators at Guantanamo Bay," *NEJM* 353(1):6-8 (7 July 2005); Susan Okie, MD, "Glimpses of Guantanamo—Medical Ethics and the War on Terror," *NEJM* 353(24):2529-2534 (15 December 2005).

[142] Leonard Rubenstein, JD, Christian Pross, MD, Frank Davidoff, MD, and Vincent Iacopino, MD, PhD, "Coercive U.S. Interrogation Policies: A Challenge to Medical Ethics," *JAMA* 294(12):1544-1549 (28 September 2005); also of note was Steven H. Miles, MD, ""Abu Ghraib: its legacy for military medicine," *The Lancet* 364:725-729 (25 August 2004). Miles later expanded his piece into a book-length treatment, in Stephen H. Miles, *Oath Betrayed: Torture, Medical Complicity, and the War on Terror* (New York: Random House, 2006)

[143] Much of this attention was triggered by a June 2004 *New York Times* account of the use of Behavioral Science Consultation Teams (BSCT, or "biscuits") to facilitate interrogations at Guantánamo. Biscuits were composed of a psychiatrist, psychologist, and medical assistant, who studied detainee records, including medical records, to develop effective interrogation strategies. Critics held that this violated patient confidentiality; some believed the medical personnel should not be involved, even without access to individual records. Though declining a recommendation to do away with these teams, the Pentagon did eliminate their access to the medical files.

The summer 2004 articles which launched the ethical discussion in the U.S. also clashed jarringly with an ongoing series of al-Qa'ida kidnapping and beheadings. In contrast to what seemed a sometimes utopian ethicist view, medical personnel saw themselves as living within a very real and dangerous world, fulfilling a societal obligation to support the legal, safe, and effective measures that were necessary to combat just such horrors. The role assigned to medical personnel combined the societal obligation with a responsibility for patient well-being.[144] The medical presence reflected a government commitment to the fundamental well-being of the detainee, while not allowing this commitment to preclude the acquisition of important, time-perishable intelligence not otherwise obtainable. The limits medical personnel set, and interventions made, allowed for the acquisition of the greatest possible information without placing the detainee at medical risk. In combination with RDG's tightly circumscribed policies on coercive measures, medical monitoring spared almost all detainees from experiencing more than a very time-limited period of discomfort.

In the continued ethical reiterations of 2005, some tacit acknowledgement of the societal obligation occasionally was implied, but only to be immediately discounted because some empirical "evidence" eliminated any potential ethical conflict. Both ethicists and the press regularly asserted that coercive measures were ineffective if not counterproductive, and produced serious and long-lasting physical and psychological aftereffects. More pointedly, the presence of medical personnel during interrogations was said to embolden the interrogators and lessen their restraints, thus placing interrogates at greater, not lesser risk. At worst, any physician present risked being co-opted, or socialized into a Nazi mentality.[145]

However much such "facts" simplified the ethicist's case, the OMS empirical experience was just the opposite. Invaluable intelligence resulted, medical and psychological aftereffects were not evident, and the presence of medical personnel unquestionably moderated interrogations and led to more benign interrogation guidelines. Medical autonomy also was preserved, with OMS personnel answering professionally only to OMS. Medical personnel were allowed to provide care to detainees even under interrogation, in a professional and humane manner; and no one ever was asked to use medical expertise against a detainee, or to withhold treatment.

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[144] Analogous dual physician roles are seen in forensic psychiatry, and occupational and public health, in which the public good sometimes overrides patient preferences.

[145] Rubenstein et al, "Coercive U.S. Interrogation Policies."

Finally, the carefully managed, selectively targeted Agency approach to interrogation had almost nothing in common with the excesses, program laxity, and indiscriminate focus alleged at Abu Ghraib and Guantánamo. From the outset, the RDG program was tightly circumscribed and carefully monitored, and quickly corrected problems encountered in the formative months. Almost from the outset, all interrogators, debriefers, guards, and medical personnel were prescreened, trained, guided both orally and in writing, and then monitored throughout their involvement with detainees. Despite its press image, this was a very carefully controlled program.

Program details—beyond that asserted in the media—were, of course, unknown to medical ethicists, but even with a more accurate understanding they likely would have reached the same conclusions. This was not necessarily the OMS expectation when the first medical ethics articles appeared in 2004. Unaware just how disproportionate had become the ethicists' commitments to the patient vis-à-vis society, there was some passing frustration at the mindset that casually equated mild to modest measures (e.g., limited sleep deprivation, or feeding through an NG tube) with sadistic, potentially lethal physical violence. All were torture or tantamount to it.[146] Much more useful would have been thoughtful, medically informed recommendations to help balance the acceptable degrees of coercion against the immediacy and gravity of an avoidable terrorist threat.

Ethicist views were anchored in "international" and "humanitarian" legal standards and professional declarations dating to the mid-1970s. Until the Administration's 2002 determination that al-Qa'ida terrorists were not legal combatants and thus not protected by Geneva Conventions, Common Article 3 of the Geneva Conventions provided a solid legal cornerstone for the ethicist position. Common Article 3 prohibited "at any time and in any place whatsoever: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment." A prohibition against cruel, humiliating or degrading treatment, or outrages on personal dignity could be and were used to cover a very wide range of interrogation measures.

Absent Common Article 3, there still was the UN Convention Against Torture, which as ratified by the U.S. barred the "intentional infliction of severe physical or mental pain and suffering." This was a much higher threshold, more genuinely consistent with what popularly would have been deemed torture. However, this too had been further circumscribed by DoJ's determination that "severe" pain was akin to that accompanying serious physical injury or organ failure, and that severe mental harm must last "months or years."

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[146] Medical ethicists and the critical press were not the only ones to take this view. Even some who advocated the use of what the Agency viewed as coercive interrogation referred to it as justifiable "torture."

Further, along with railing at the Administration's permissive interpretations and asserting a humanitarian obligation to follow the Geneva Accords even if they were not legally binding, ethicists turned to another potentially valuable ally to carry their case—the professional associations of organized medicine.

The acknowledged foundational guidance on physicians and interrogation was issued in 1975 by the World Medical Association (WMA)[147] in response to questions about physician responsibilities in coercive interrogations of Northern Ireland militants. The WMA's "Declaration of Tokyo" held that physicians should not "countenance, condone or participate in the practice of torture[148] or other forms of cruel, inhuman or degrading procedures," nor "provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment." Doctors were not to be present "during any procedure during which torture or other forms of cruel, inhuman or degrading treatment are used or threatened." In short, "the doctor's fundamental role is to alleviate the distress of his or her fellow men, and no motive whether personal, collective or political shall prevail against this higher purpose." The WMA reissued this declaration in both 2005 and 2006—after the extensive press reports of 2004-2005—adding a new section stating that physicians should not "use nor allow to be used, as far as he or she can, medical knowledge or skills, or health information specific to individuals, to facilitate or otherwise aid any interrogation, *legal or illegal*, of those individuals" (emphasis added).

In 2005 the American Psychological Association also addressed "Psychological Ethics and National Security," partially in response to accusations of unethical behavior by Behavioral Science Consultation Teams (BSCT, or "biscuits") at Guantánamo Bay. These teams were comprised of a psychiatrist, a psychologist, and a medical assistant, who sought to bring the insights of behavioral science to the interrogation process. Allegedly they had used medical records to devise interrogation strategies. The APA (psychologist), without addressing any specific allegation, enumerated the "ethical obligations in national security-related work." More nuanced than guidance soon issued by medical organizations, this advised that psychologists:

--should not engage in, direct, support, facilitate, or offer training in torture or other cruel, inhuman, or degrading treatment;
--do not use health care related information from an individual's medical record "to the detriment of the individual's safety and well-being";
--do not engage in behavior that violates U.S. law and may refuse for ethical

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[147] The WMA was established immediately after World War II to address issues of international concern. The American Medical Association was one of many founders.
[148] Torture was defined by the WMA as "the deliberate, systematic or wanton infliction of physical or mental suffering…to force another person to yield information, to make a confession, or for any other reason."

reasons to follow laws that are unjust or that violate basic principles of human rights [but if a conflict results, they "may adhere to the requirements of the law"]

--"are sensitive to the problems inherent in mixing potentially inconsistent roles such as health care provider and consultant to an interrogation, and refrain from engaging in such multiple relationships"

--"may serve in various national security-related roles, such as a consultant to an interrogation, in a manner that is consistent with the Ethics Code, and when so doing...are mindful...of contexts that require special ethical consideration."

The following year an August 2006 APA resolution aligned the APA position more specifically with the United Nations Convention Against Torture, and the McCain Amendment (see following sections), but added no additional specificity to the guidance.

The American *Psychiatric* Association, though concerned over the 2005 Guantánamo reports, did not issue its own guidance for another year. In May 2006, this APA (psychiatrist) issued a "Position Statement" on "Psychiatric Participation in Interrogation of Detainees," which stated that psychiatrists should not participate in, or otherwise assist or facilitate, the commission of torture." It continued, in part:

> "...No psychiatrist should participate directly in the interrogation of persons held in custody by military or civilian investigative or law enforcement authorities, whether in the United States or elsewhere. Direct participation includes being present in the interrogation room, asking or suggesting questions, or advising authorities on the use of specific techniques of interrogation with particular detainees. However, psychiatrists may provide training to military or civilian investigative or law enforcement personnel on recognizing and responding to persons with mental illnesses, on the possible medical and psychological effects of particular techniques and conditions of interrogation, and on other areas within their professional expertise."

Until mid-2007 OMS psychologists, given the legality of Agency practices (reaffirmed by DoJ in March 2005), saw themselves as working within the APA (psychologist) guidelines. OMS psychiatrists never were asked to monitor interrogations, though not as a matter of policy. Initially, psychologists were more available and soon they were more experienced. The APA (psychiatrist) guidelines were the more restrictive of the two, but on careful reading might still have allowed a role similar to that actually performed by OMS psychologists.

The next issued, and more categorical guidance came from the American Medical Association: "Physicians must not conduct, directly participate in, or monitor an interrogation with an intent to intervene, because this undermines the physician's role as healer." In a modest concession to the physician's societal obligations, the statement added, "Because it is justifiable for physicians to serve in roles that serve the public interest, the AMA policy permits physicians to develop general interrogation strategies that are not coercive, but are humane and respect the right of individuals."[149]

Since medical licensure in the United States is the exclusive purview of state medical boards, professional organizations such as the AMA have no direct power to enforce their views. State boards act on ethics violations, however, so the policy statements of professional organizations do have a potential impact. Critics very early sought to bring about change at Guantánamo Bay by attacking the licensure of the supporting medical staffs. Soon after the role of BSCT teams was publicized, the *New York Times* reported that lawyers representing detainees were trying to gather doctor's names to bring ethics changes against them in their home states.[150] Failing in this effort, lawyers later targeted physician John Edmondson, commander of the Guantánamo Bay Naval Hospital. In July 2005, a complaint against Edmondson was filed with the California State Board of Medicine, which had issued his license. He was charged with "unprofessional" conduct, including having overseen the inappropriate sharing of medical data, refusal of treatment, and active and passive involvement in physical abuse. The Board declined to pursue the case on the grounds that it could take no action against a military physician practicing on a military base absent action first by the military. They also cited a recently released study by Army Surgeon General Kiley, which had not found evidence of any medical abuse of the detainees.[151]

A few weeks later—on the fourth anniversary of 9/11—131 Guantánamo Bay detainees began a hunger strike to protest the conditions of their detention and lack of due process. Of these, [redacted] were involuntarily fed through naso-gastric tubes, most compliantly and within their cells.[152] (Given the small proportion of strikers artificially fed, the Navy probably followed a protocol similar to that of OMS and the Bureau of Prisons.) Physicians for Human Rights strongly protested the forced feedings, which was counter to both the WMA and AMA codes of ethics and which allowed a prisoner to starve himself to death.[153] Detainee lawyers used this episode to resume their challenge to Dr. Edmondson's licensure, and in January 2006 unsuccessfully argued to a California court that in view of the forced feedings the court should compel the state medical board to act.[154]

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[149] AMA Press release, 12 June 2006, "New AMA ethical policy opposes direct physician participation in interrogation." This position seems to reject the suggestion of some ethicists that "limit setting, as guardians of detainee health" might be an acceptable role for physicians in "legitimate interrogation." See Bloche and Marks, "When Doctors Go to War."

The only other professional association to issue medical ethical guidance on interrogations was the American Academy of Physician Assistants (AAPA). This guidance was the most sparse. In 1987 the AAPA adopted statements opposing "participation of physician assistants in…torture or inhuman treatment," and endorsing "the 1975 World Medical Association Declaration of Tokyo which provides guidelines for physicians and, by nature of their dependent relationship, for physician assistants, in cases of torture or other cruel, inhuman or degrading treatment or punishment in relation to detention or imprisonment." Most recently these AAPA statements were reaffirmed in 2003.

[150] "Psychologists Warned on Role in Detention," *New York Times*, 6 July 2004.

[151] "Head of hospital at Guantanamo faces complaint," *New York Times*, 15 July 2005; "Lawyers will appeal ruling that cleared Guantanamo doctor of ethics violations," *BMJ* 331:180, 23 July 2005. An appeal to the Board also failed.

[152] Susan Okie, "Glimpses of Guantanamo—Medical Ethics and the War on Terror." By mid-October the number of strikers was down to 25.

OMS viewed state licensing board action as a potential risk. The fact of a medical presence in the Agency program was easily discerned. Almost from the beginning there had been recurring charges that Agency medical personnel withheld pain medicine from AZ, drugged some detainees during transfer, and force fed al-Masri. The first substantial discussion of this issue, however, did not come until after the fourteen remaining HVDs were transferred to Guantánamo Bay in September 2006. The ICRC interviewed all fourteen, who comprised the most important al-Qa'ida operatives captured to date and had been those most aggressively interrogated.

The detainees appear to have given the ICRC a generally accurate summary of their overall experience (albeit recalling some traumatic episodes as lasting longer than they did). Enough medical information was included for the resulting ICRC report to include a section on "Health Provision and the Role of Medical Staff." This noted the provision of medical examinations on arrival, during interrogation, and during the long subsequent detention. Treatment provided was deemed "appropriate and satisfactory," with a comment that "in two specific instances…exceptional lengths were taken to provide very high standards of medical intervention."[155] The overriding issue, however, was the medical presence during the interrogation process, a presence correctly inferred from the use of a pulse oximeter during KSM's waterboard sessions, the repeated measurement of leg circumference during standing sleep deprivation, and detainee reports that medical personnel checked them during interrogations and sometimes intervened to stop the process.

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[153] In 1991, the WMA position was modified to allow the option of physician intervention once the patient became confused or lapsed into coma, but both the Bureau of Prisons and the physicians at Guantánamo Bay act far before this stage is reached. In 2006 the WMA issued a lengthy further revision of its policy statement, which concluded: "Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment." Moreover, "[i]f a physician is unable for reasons of conscience to abide by a hunger striker's refusal of treatment or artificial feeding,….[he or she] should refer the hunger striker to another physician who is willing to abide by the…refusal." World Medical Association Declaration on Hunger Strikers, as revised by the WMA General Assembly, Pilanesberg, South Africa, October 2006.

[154] *Jurist*, 8 January 2008; for fuller coverage, The Observer, 8 January 2006, on Guardian Unlimited, accessed at http://observer.guardian.co.uk/world/story/0,16937,1681736,00.html,. Subsequently, a British activist physician again filed this same charge against Edmondson with the medical boards of the states of California and Georgia. See "Force feeding at Guantanamo breaches ethics, doctors say," *BMJ* 332:569 (11 March 2006).

[155] "ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody," February 2007.

Labeling Agency interrogations ill-treatment tantamount to torture, the ICRC judged that the Agency program did not qualify as a "lawful interrogation, [in which] a physician may be asked to provide a medical opinion, within the usual bounds of medical confidentiality, as to whether existing mental or physical health problems would preclude an individual from being questioned," or "requested to provide medical treatment to a person suffering a medical emergency during questioning." Rather, medical personnel were "ruling on the permissibility…of physical or psychological ill-treatment." Their conclusion, therefore, was that:

> "….the interrogation process is contrary to international law and the participation of health personnel in such a process is contrary to international standards of medical ethics. In the case of the alleged participation of health personnel in the detention and interrogation of the fourteen detainees, their primary purpose appears to have been to serve the interrogation process, and not the patient. Is so doing the health personnel have condoned, and participated in ill-treatment."

Like many human rights and professional medical organizations, the ICRC held the traditional formulaic view that there were three controlling principles in medical ethics: act always in the best interest of the patient, do no harm to the patient, and insure the patient's right to dignity. Had OMS assessed itself against these criteria, it would have said that during the entire post-interrogation phase of detention these principles were honored. Excepting only a handful of involuntary feedings, consent was obtained before all medical procedures—or they were not undertaken.[156] During the Agency's legally-sanction interrogations, however, the preservation of detainee dignity and "best interest" would have defeated the process, at the cost of innocent lives. Given the magnitude of the perceived terrorist threat, short periods of indignity and significant but medically safe discomfort (far short of serious, much less severe pain) seemed an ethically inconsequential price to pay to obtain the cooperation necessary to save lives. OMS nonetheless still was able to insure that no harm befell detainees while fulfilling a societal obligation that otherwise would have been impossible. There never was any question that, forced to make a choice, the preservation of lives would override the preservation of dignity.

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[156] Tube feeding, while involuntary, was never forced, as the detainees always cooperated with the procedure. An intake physical examination, including appropriate blood work, also was mandatory, but after the interrogation phase detainees could decline physical exams (or elements of the exam) or laboratory studies, though almost none did. Concurrence was obtained in writing for all invasive procedures. There sometimes was a certain incongruity in asking a detainee for consent. At one point Nashiri, who at the time was manacled and closely attended by guards (because of recent acting out), laughed when the attending dentist asked his permission to pull a problem tooth: "You obviously can do anything you want," Nashiri noted. But he did give his consent.

Notably, the ICRC's report on the fourteen detainees was not immediately leaked to the press.[157] The record to date suggests that this eventually will happen, at which time advocacy groups probably will attempt to attack the licensure of some OMS physicians. There are several reasons to believe that most if not all state medical boards would deal with ethics charges much as had California:

--DoJ had provided legal sanction to the program
--the C.I.A. (like DoD) would strongly assert the legal, ethical, and appropriately circumscribed role of the medical staff
--specific individual medical responsibilities likely would remain classified
--Bureau of Prisons policy and medical personnel would be similarly implicated
--even were existing medical ethical guidance relevant, it was sufficiently imprecise that it had to be clarified in 2006, after which no enhanced interrogations took place.[158]

A greater problem than licensure per se may be the legal and professional harassment of activists hoping to end an unpopular program by driving away its medical support, in essence exploiting the government's commitment to insuring that detainees are not harmed.

In August 2007, the American Psychological Association revisited their 2005 and 2006 statements on psychologist support to interrogations, and issued much more explicit and categorical guidance. This included an "absolute prohibition for psychologists against direct or indirect participation in interrogations or in any other detainee-related operations" involving a lengthy list of techniques alleged in media reports. Most relevant were hooding, forced nakedness, stress positions, slapping or shaking, and "sensory deprivation and over-stimulation and/or sleep deprivation used in a manner that represents significant pain or suffering or in a manner that a reasonable person would judge to cause lasting harm."[159] A movement to bar psychologists altogether from interrogation facilities was not successful. By the time this was issued (see following sections), the only clearly relevant item was slapping, though standing sleep deprivation would probably have been controversial.

More problematic than barring psychologist involvement in the prohibited techniques was a requirement that APA members report any psychologist who has participates in these techniques to the APA Ethics Committee, who in turn could revoke memberships and potentially jeopardize state licensure.[160] This; in essence, placed Agency psychologists in the same potentially vulnerable position as Agency physicians.

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[157] In spring 2007, DCIA Hayden was asked to address Congressional Oversight Committees on various charges contained in the ICRC report. In these Hayden categorically denied any medical role other than monitoring the well-being of the detainees and providing treatment when indicated.

[158] APA (psychologist) guidance was less restrictive, but even so only one such interrogation took place after it released new guidance in 2005.

[159] "Reaffirmation of the American Psychological Association Position Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and Its Application to Individuals Defined in the United States Code as 'Enemy Combatants,'" Resolution Adopted by APA on August 19, 2007. Among the dozen or more enumerated techniques were waterboarding, hypothermia, exposure to extreme heat or cold, and exploitation of phobias or other psychopathology.

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[160] "APA Rules on Interrogation Abuse," *Washington Post*, 20 August 2007; Eve Conant, "Capital Sources: Shrinks and Torture," *Newsweek* "Web Exclusive," 20 August 2007.

An Unfinished Chapter

The new DoJ policy statement on torture issued in December 2004 stated that it did not invalidate previous guidance on specific interrogation techniques. DoJ's long-awaited re-evaluation of these techniques finally was forwarded to the Agency in May 2005. Three separate memoranda were sent, all reflecting an understanding of Agency practice and experience not available in 2002—as well as insights gleaned from the voluntary waterboarding of a senior DoJ lawyer.

A foundational 10 May 2005 memoranda corrected and expanded the 2002 descriptions, then reaffirmed that the previously addressed techniques fell short of torture.[161] These were three conditioning techniques (dietary manipulation, nudity at ambient temperature of at least 68°, and sleep deprivation), five corrective techniques (attention grasp, facial hold, facial or insult slap, abdominal slap, and walling), and four coercive techniques (stress positions, water dousing, cramped confinement, and waterboard). A second 10 May 2005 memorandum expressly extended this conclusion to the combined use of these techniques.[162] The final memorandum, dated 30 May 2005, responded to an Agency IG concern in affirming that these techniques were not barred by Article 16 of the Convention Against Torture, as ratified. This barred "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution." As interpreted the Fifth Amendment was of greatest relevance, and the Supreme Court standard against which treatment was to be measured was whether a techique "is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience"—a judgment noted by the Court to be highly context-specific and fact-dependent.[163]

New to the 2005 guidance was an extraordinary reliance on OMS input, totally absent in 2002. The Agency General Counsel, during an early 2004 visit, had mentioned that OMS involvement now was central to the Agency's legal case. Just how important became clearer in summer OMS-DoJ discussions during which C/MS finally observed that DoJ seemed to be under the misimpression that this was an OMS program—rather than OMS supporting CTC/RDG. In acknowledging an overemphasis, DoJ nonetheless said the presence of OMS was critical to their determinations. OMS thereafter tried to remain alert to any transformation from the notion that the RDG program being acceptable in part because of OMS involvement into something that sounded more like the program being acceptable because OMS said it was. The only OMS role, if and when Justice determined that any given technique was legal, was to insure the safety of the detainee—a responsibility as well shared by interrogators and other staff.

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[161] Steven Bradbury (DoJ/OLC) to John A Rizzo, Senior Deputy General Counsel, Central Intelligence Agency "Re: Application of 18 U.S.C. 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee," 10 May 2005.

[162] "Memorandum for John Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, "Re: Application of 18 U.S.C. 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees," 10 May 2005.

[163] Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency "Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees," 30 May 2005.

The final DoJ memoranda stated that the legitimacy of the RDG program hinged on several-OMS relevant factors: OMS autonomy within the program; OMS assurance that detainees would be adequately evaluated—physically and psychologically—prior to, during, and following any enhanced interrogations; the authority of OMS to stop or otherwise limit any ongoing interrogation, if medically indicated; and the OMS experience that to date no medically significant aftereffects had been apparent in any previously interrogated detainee. A reliance on OMS was underscored by the inclusion of multiple quotations incorporated from the latest (December 2004) issuance of OMS Guidelines, and by many references to discussions with OMS personnel. An illustrative excerpt, from the 10 May 2005 memoranda addressing interrogation techniques:

> "In addition, the involvement of medical and psychological personnel in the adaptation and application of the established SERE techniques is particularly noteworthy for purposes of our analysis. Medical personnel have been involved in imposing limitations on—and requiring changes to—certain procedures, particularly the use of the waterboard. We have had extensive meetings with the medical personnel involved in monitoring the use of these techniques. It is clear that they have carefully worked to ensure that the techniques do not result in severe physical or mental pain or suffering to the detainees.... In addition, they regularly assess both the medical literature and the experience with detainees. [FN To assist in monitoring experience with the detainees, we understand that there is regular reporting on medical and psychological experience with the use of these techniques on detainees and that there are special instructions on documenting experience with sleep deprivation and the waterboard.] OMS has specifically declared that "[m]edical officers must remain cognizant at all times of their obligation to prevent "severe physical pain or suffering" [citation omitted]. In fact, we understand that medical and psychological personnel have discontinued the use of techniques as to a particular detainee when they believed he might suffer such pain or suffering, and in certain instances, OMS medical personnel have not cleared certain detainees for some—or any—techniques based on the initial medical and psychological assessments. They have also imposed additional restrictions on the use of techniques (such as the waterboard), in order to protect the safety of detainees, thus reducing further the risk of severe pain or suffering. You [i.e., the Agency] have informed us that they will continue to have this role and authority. We assume that all interrogators understand the important role and authority of OMS personnel and will cooperate with OMS in the exercise of these duties...."

Read in totality, the final DoJ guidance made clear that the OMS role was supportive, but this lengthy paragraph still was potentially misleading, in citing the "involvement of medical and psychological personnel in the adaptation and application of the established SERE techniques." The only OMS role in the adaptation or application of SERE techniques was to place medical restrictions on the use of the techniques selected and authorized independently of OMS.

Following the summer 2004 press accounts, and prior to these DoJ memoranda, Senators John McCain (R-Ariz) and Lieberman (D-Conn) put language into an intelligence bill which barred "torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws or treaties of the United States," and required a report to Congress on interrogation measures. In January, at Administration urging, this language was dropped. That spring, 2005, Democrats and Republicans debated the need for a probe of interrogation practices, but no probe resulted.

In October 2005, Senator McCain introduced an amendment to a Defense appropriation bill which again barred "cruel, inhuman, or degrading treatment or punishment"—defined as any "cruel, unusual, and inhumane treatment or punishment" prohibited by the Fifth, Eighth, and Fourteenth Amendments (applying to non-US citizens what otherwise would have pertained only to U.S. citizens). Kerry also attached an amendment to the Senate Intelligence Authorization bill requiring a report on the Agency's recently publicized Eastern European and Asian detention facilities. Ultimately both Kerry amendments failed, but the McCain amendment moved forward—ultimately without an Agency exemption sought by Vice President Cheney and DCIA Porter Goss.

The McCain amendment—subsequently known as the Detainee Treatment Act (DTA)—passed both House and Senate by large margins, and in December 2005 was signed into law. The implications of the DTA proved somewhat more limited than expected. DoJ already had ruled that Agency techniques did not reach the threshold for the "cruel, inhuman, or degrading" treatments barred by the Constitution, and a new DTA requirement that DoD interrogation guidelines be followed was applicable only to DoD facilities, and not to "secret" Agency sites. Less reassuring was the way the DTA addressed the question of legal protections for those engaged in authorized interrogations. This stated that the U.S. Government "may" pay employee costs (including legal counsel) associated with civil action or criminal prosecution, and offered as an employable defense that "a person of ordinary sense and understanding would not know the practices were unlawful."

(b)(1)
(b)(3) NatSecAct

(b)(3) NatSecAct

[redacted] (b)(3) NatSecAct

[redacted] (b)(1) (b)(3) NatSecAct

(b)(1) (b)(3) NatSecAct

Over several months in the spring and summer of 2006 an OMS physician escorted five detainees that required specialized evaluation or surgery [redacted] [redacted] to received this care. Additionally, during this period a concerted effort was made to move as many detainees as possible out of Agency hands. Of the [redacted] still in RDG facilities in late February, half had been transferred elsewhere by September, with most returned to their countries of origin. As previously, OMS personnel accompanied all detainee movements.

(b)(1) (b)(3) NatSecAct

In June, 2006, the Supreme Court ruled in *Hamden v. Rumsfeld* that the military commission system then in place at Guantánamo Bay was not legally authorized. Additionally, the Court stated that the provisions of Common Article 3 of the Geneva Conventions (on the treatment of prisoners of war) was applicable to detainees. In response to this ruling, the Administration introduced legislation that became the Military Commission Act (MCA) of 2006 (signed in October).

The MCA established a new system of military tribunals and, consistent with Common Article 3, amended the War Crimes Act of 1996 to bar not just techniques that caused "severe physical or mental pain or suffering" ("torture"), but also those which caused "severe or serious physical or mental pain or suffering" (or "cruel or inhuman treatment"). No specific techniques were addressed; rather, the President was given authority to more specifically interpret the implications of the Common Article 3 through an Executive Order.

Finally, the MCA strengthened the protections extended by the DTA to those involved in authorized interrogations prior to 30 December 2005. Employee costs incurred during any investigation or prosecution—in the U.S., abroad, or in international tribunals—would be paid by the U.S. government.

During the summer 2006, a White House decision was made to transfer to military custody at Guantánamo Bay the 14 HVDs [redacted] (b)(1) (b)(3) NatSecAct [redacted]

(b)(1) (b)(3) NatSecAct [redacted]

[redacted]

(b)(1)
(b)(3) NatSecAct

(b)(1)
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(b)(1)
(b)(3) NatSecAct

With the transfer of the 14 detainees to Guantánamo, [redacted] [redacted] Within a few months, a newly captured detainee was transferred [redacted] Abdul Hadi al Iraqi, the designated replacement for Zarqawi as head of al-Qa'ida operations in Iraq. He had read of CIA interrogation methods, he said, and preferred just to cooperate without them. Whether or not he was truly forthcoming is unclear, but no enhanced interrogation methods were employed prior to his transfer to Guantánamo Bay in April 2007. [redacted] [redacted]

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

[redacted] [redacted] There they were allowed to talk with one another, some for the first time in several years, and also were interviewed by the ICRC. Each was assigned a military lawyer to help prepare for a tribunal hearing on their status as illegal combatants. Were this status established, they then faced prosecution for their terrorist acts.

To date the Agency program had passed through two almost discrete phases. The first period, from 2002 through 2004, was primarily one of multiple successful interrogations. The second period, from 2005 through 2006, was one of lengthening detentions. The character of any third period is—as of summer 2007—still uncertain. While the Agency suspended use of EITs following the December 2005 enactment of the DTA, it did not abandon the notion of playing a unique role in the interrogation of HVDs. After reviewing the overall program, the Agency sent DoJ a request to evaluate a much reduced set of proposed "enhanced" techniques, which did *not* include walling, the waterboard, confinement boxes, dousing, and stress positions. The proposed array of techniques was limited to the three established conditioning techniques: nudity, dietary manipulation, and sleep deprivation, and four of the five corrective techniques approved in 2005: facial grasp, attention grasp, abdominal slap, and facial or insult slap (but not walling). No coercive measures were included.[164] The proposed upper limit on sleep deprivation remained at 180 hours, but with a new requirement that the detainee be reassessed after 96 hours and specifically re-approved for each additional 24 hours.

OMS welcomed these changes as further limiting medical risks without appreciably weakening program effectiveness. In its view, interrogation success appeared to result primarily from the three "conditioning" techniques proposed for retention, particularly sleep deprivation.[165] Since to date only three detainees had been kept awake beyond 96 hours (and none as long as 180 hours), the proposal was entirely consistent with ongoing practice. "Corrective" techniques also appeared to play a synergistic role, but from the medical standpoint, walling was somewhat problematic because if not handled carefully could result in head contact with the wall. It also appeared less controlled than any other technique, and infrequently required some medical intervention.[166] Elimination of all coercive measures, and walling, would appreciably simplify medical monitoring.

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[164] In contrast to the reality, a *Newsweek* "WEB EXCLUSIVE," 20 September 2005, cited Senate staffers as saying the Administration were trying to redefine the Geneva limitations to allow seven techniques: 1) induced hypothermia, 2) long periods of forced standing, 3) sleep deprivation, 4) the "attention grab" (forcefully seizing the suspect's shirt), 5) the "attention slap," 6) the "belly slap" and 7) sound and light manipulation.

As previously, OMS was brought into these newest DoJ discussions, this time in the hope that a medical distinction was possible between "severe" and "serious" physical and mental suffering. Thinking this an entirely legal question, OMS declined to speculate. Ultimately, a provisional DoJ analysis found all the requested techniques legally acceptable, i.e., they did not reach the threshold of "serious" pain or suffering. A definitive ruling awaited the underlying Executive Order interpreting Common Article 3. OMS also contributed to this discussion, through a briefing for DNI Admiral Mike McConnell on medical support to the interrogation and detention program.

(b)(1)
(b)(3) NatSecAct

The President's Executive Order finally was released in mid-July 2007, prompted by the desire to interrogate a key al-Qa'ida operative, recently captured and rendered [redacted] This EO interpreted Common Article 3 as requiring "the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care." Barred were torture or other acts comparable to murder, torture, mutilation, cruel and inhuman treatment, or acts of abuse or degradation what a reasonable person would deem "beyond the bounds of human decency." Beyond these limits, enhanced measures were still allowable, as was detention without outside access. [NEED TEXT]

The Justice Department immediately followed this with concrete guidance largely unchanged from that agreed to in draft, and allowing sleep deprivation (as above), dietary manipulation, and the several requested slaps and holds. Only nudity had been changed—to diapering.

Asked about the Executive Order on NBC's "Meet the Press," Director of National Intelligence (DNI) Mike McConnell would not say exactly what would be permitted, but he did highlight—as never publicly before—the medical role in the process:

[redacted] (b)(1)
(b)(3) NatSecAct

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[166] On two occasions detainees complained of potentially walling-associated memory or hearing loss, but a detailed evaluation at the time found both to be feigned symptoms.

> "...When I was in a situation where I had to sign off, as a member of the process, my name to this executive order, I sat down with those who had been trained to do it, the doctors who monitor it, understanding that no one is subjected to torture. They're, they're treated in a way that they have adequate diet, not exposed to heat or cold. They're not abused in any way. But I did understand, when exposed to the techniques, how they work and why they work, all under medical supervision."[167]

(At the time of this writing—September 2007—the only candidate to be interrogated under these new guidelines alleged the unusual combination of visual and auditory hallucinations after just over 100 hours of standing sleep deprivation. As a result, he was allowed a 16-hour sleep break, but continued to claim visual hallucinations. A thorough psychological examination at that time led to the conclusion that he was malingering. He was returned to intermittent sleep deprivation, up to the 180 limit [over 30 days], but this did not achieve compliance with interrogators.)

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[167] Transcript, Mike McConnell interview on "Meet the Press," Tim Russert, Anchor, MSNBC.com, 22 July 2007. The possible interpretation that physicians were supervising the enhanced interrogations later was addressed briefly by a McConnell spokesman who clarified that McConnell said that doctors would "monitor, not supervise" interrogations, but would not clarify if this referred to physicians, or how the monitoring would be accomplished, or if this was a new requirement. Spencer Ackerman, "(Re)Call the Doctor: Physicians Involved in CIA Interrogations?," TPMMuckracker.com, 23 July 2007. Russert, like many others, wanted to know what techniques could and could not be used (especially the waterboard), but McConnell—like other Administration spokesmen—refused to specify on the grounds that this would allow training against the techniques, and "because they believe these techniques might involve torture and they don't understand them, they tend to speak to us, talk to us in very—a very candid way."

Interim Afterthoughts

(b)(3) CIAAct (b)(3) CIAAct (b)(3) CIAAct

Support to the RDG program may well be the most extensive operational commitment in the history of the Office of Medical Services. It certainly was one of the most intense. During the five years from 2002 to 2007, [redacted] OMS staff officers [redacted] (b)(3) CIAAct physicians, [redacted] psychologists, [redacted] PA's, and [redacted] nurses) were directly involved in the program. These officers evaluated, monitored and provided quality care to 97 detainees variously held in ten Agency facilities. They also accompanied well over a hundred detainee transfer flights. Their guidance and presence made possible one of the most successful counter-terrorist operations in the history of the Agency.

(b)(3) CIAAct

An enumeration of the intelligence take from the dramatically successful RDG program is beyond the scope of this history. Over 8,000 intelligence reports were generated, which was half or more of all al-Qa'ida reporting during the period. Detainee-provided information led directly to the capture of other key terrorists, averted several major terrorist attacks, and became a foundation for the 9/11 postmortem analysis. Even in the face of crippling media leaks and widespread public criticism, the Agency (and Administration) remained unwilling to abandon what had proven an invaluable tool.

Whether a more circumscribed future program will prove similarly valuable remains to be seen. Even with a retained core of less aggressive but seemingly effective techniques, this may not be possible. Eventually the Administration will be pressed to state publicly that certain aggressive measures will not be used (thereby reassuring future detainees, to the detriment of the process). Crippling leaks will remain inevitable, and approved techniques—however benign—eventually will become known and again be targeted by human rights activists. This could easily lead to the elimination of all the synergistic adjuncts to sleep deprivation, and so limit sleep restriction that it rarely is effective. Additionally, publicity to date will have led to the development of effective resistance measures.[168] In short, the immediate prospects do not look promising. Taking a longer view, future terrorist use of WMDs is viewed as inevitable; and such an attack would likely lead to another reevaluation of what interrogation measures are acceptable.

When OMS again is approached on this subject, this brief history may be of some value. A few points may be worth repeating. As OMS began this chapter, it could find no comparable record of the somewhat related experiences of the Fifties, which would have been useful. Organizationally, OMS was somewhat buried at the time in a short-lived but distracting realignment with Human Resources. Operational requests regularly were addressed, but outside the paramilitary environment OMS was not then aggressively attempting to insert itself into operations. Thus, when OTS formulated its approach to detainee interrogation, there was no meaningful medical input or review—and interrogational excesses resulted. In hindsight it's easy—though in the operational climate, perhaps unrealistic—to say that OMS should have been more pro-active in obtaining and critiquing the relevant briefs. Once into this fast-moving program, OMS also fell short in allowing a requirement for thorough medical records to fall victim to operational expediency and the crisis of the day. While this soon was corrected, it also was avoidable. Finally, as OMS increasingly was recognized for its vital contributions, there seemed to be a risk that too much of the program's legal justification would become OMS-based. While this issue was attended to, in view of the unique ethical issues involved it was a source of continuing concern

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[168] E.g., effective countermeasures against such techniques as standing sleep deprivation were discussed within the Agency as early as the 1950s, and simply capitalize on the desire of interrogators not to inflict serious of lasting harm. Deliberate "collapse" or a sophisticated but feigned hallucination will almost guarantee a reprieve which likely will defeat the interrogation process as used to date.

A last word on ethics. The more proscriptive stands taken by professional organizations since 2006 will pose potential dilemmas for OMS professionals supporting detainee operations in the future. The OMS officers who previously worked in this program confronted less concrete "ethical" issues, but nonetheless involved themselves because they thought it was the right thing to do, and because of their trust and respect for those already involved. [redacted]MS may have been representative in viewing the legitimacy—i.e., ethics—of the program as dependent on it being legal, effective, safe and necessary. Necessity required solid evidence that interrogation candidates possessed critical, time-perishable information unobtainable through less aggressive alternative measures. DoJ affirmed legality. The empirical record affirmed effectiveness and, through the presence of OMS, the safety of the program. Finally, criticality and urgency each received case-by-case analysis from CTC. Though imperfect this review nonetheless limited the application of EITs to less than a third of the 97 detainees who came into Agency hands, and further limited use of the most aggressive techniques to only 5 or 6 of the highest value detainees. A criterion of "necessity" also requires that no aggressive measure be used when a lesser measure would suffice. For a variety of reasons, the program initially was ill-prepared to make this judgment, but experiences during the first year had it well on its way to a minimalist approach.

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(U) OVERVIEW OF CIA-CONGRESS INTERACTIONS CONCERNING THE AGENCY'S RENDITION-DETENTION-INTERROGATION PROGRAM

(U) Scope Note

~~(TS/~~[redacted]~~/NF)~~ This paper provides an overview of CIA's major interactions with Congress on the rendition, detention, and interrogation (RDI) program from 2002 through 2008. It describes what CIA briefed to Congress, who it briefed, and how often it briefed during this period. It also covers, as appropriate and possible, Bush Administration support and guidance for the program. This study is not a complete history of the program; historical background is included only to provide the larger context for those interactions. It is also not a critique of the SSCI report.

(U) The Center for the Study of Intelligence primarily has reviewed Director of Central Intelligence (DCI) and Office of Congressional Affairs (OCA) records for this study. Documents from the Office of the General Counsel (OGC) were also helpful in setting the legal background for the program, and cables from the Directorate of Operations provided details about the program's implementation. However, we found gaps in the documentary record, particularly but not exclusively relating to briefings Agency officers gave to Congress in 2004 and 2005. The record of congressional briefings for the program's first two years is better, as it is for the period 2006 to 2008, but they are still only summaries of topics covered; we do not have anything approaching a verbatim record. The documentary record on CIA's interactions with senior policymakers also has gaps, as does the record of Agency responses to congressional requests for information.

(U) Summary

~~(TS/~~[redacted]~~/NF)~~ The Agency's RDI program had the full support of the George W. Bush administration. [redacted]

~~(TS/~~[redacted]~~/NF)~~ Agency attorneys worked with senior Department of Justice (DoJ) lawyers to ensure that the program and specific interrogation techniques were deemed legal by the Department. [redacted]

~~(TS/~~[redacted]~~/NF)~~ Once the EITs had passed DoJ review, the Agency's senior leadership made a good faith effort to keep the oversight committee leaders fully briefed on the program [redacted] While verbatim transcripts of the briefings, or even summaries of all the

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briefings, were not available, the records that do exist show that Senators Bob Graham, Richard Shelby, Pat Roberts, and Jay Rockefeller, along with Representatives Porter Goss, Nancy Pelosi, Jane Harman, and Peter Hoekstra all received detailed briefings on the EITs, the program's safeguards, and the information gained from the detainees during the program's most active years, 2002 to 2005. Roberts, Rockefeller, Goss, Harman, and Hoekstra all received more than one briefing on the program. Furthermore, the Inspector General prepared and briefed a Special Review of the program to the top four members of the oversight committees in 2004. Beginning in September 2006, when the President publicly acknowledged the existence of the program, all members of the oversight committees were briefed on all aspects of the program except for the location of the detention facilities.

(U) The Historical Context of RDI

~~(TS/~~[redacted]~~NF)~~ [redacted]

(U) With the passage of time, it becomes difficult to remember the panic and fear many Americans felt after the horrific terrorist attacks on 11 September 2001. As President Bush wrote in his memoir, "The psyche of the nation had been shaken. Families stocked up on gas masks and bottled water. Some fled cities for the countryside, fearing that downtown buildings could be targets. Others who worked in skyscrapers couldn't bring themselves to go back to work. Many refused to board a plane for weeks or months. It seemed almost certain that there would be another attack."[2]

(U) Three days after the attack, Congress, by a vote of 420 to 1 in the House and 98 to 0 in the Senate, passed a resolution giving the President authority to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any further acts of international terrorism against the United States by such nations, organizations, or persons."[3]

(U) Abu Zubaydah: The First High Value Detainee

(U) Six months later, when the CIA captured its first high-value terrorist, Abu Zubaydah, in March 2002, the panic had subsided, but the fear persisted, and the Intelligence Community was under tremendous pressure to prevent future attacks. In the same week Abu Zubaydah was captured, the *Chicago Sun Times* published a column entitled "We're no safer now than we were Sept. 10"; the US Government issued a warning on a possible Easter attack on four Italian cities; a column in the *New York Times* warned readers

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that Usama bin Ladin aimed to "kill as many Americans as possible to drive them out of the Islamic world and weaken their society"; and the *Christian Science Monitor* questioned whether "traditional law enforcement and judicial procedures can cope with international terrorism."[4]

(U) President Bush recalled that he "could hear the excitement in [DCI] George Tenet's voice" when he reported that Abu Zubaydah had been captured in the early morning hours of 28 March 2002 in Pakistan.[5] The President noted that he "had been hearing reports about Zubaydah for months. The Intelligence Community believed he was a trusted associate of Bin Laden and a senior recruiter and operator who had run a camp in Afghanistan where some of the 9/11 hijackers had trained. Abu Zubaydah was suspected of involvement in previous plots to destroy targets in Jordan and blow up Los Angeles International Airport. The CIA believed he was planning to attack America again."[6]

(U) DCI George Tenet wrote in his memoir that he had first briefed National Security Adviser Condoleezza Rice about Abu Zubaydah in May 2001.[7] After 9/11, Tenet wrote, "he gained an even more prominent role in al-Qa'ida, especially once the United States killed the group's number three man, Mohammed Atef, in a November 2001 air strike in Afghanistan. Time and again…we discussed how to run Abu Zubaydah to the ground."[8]

~~(TS/~~[redacted]~~/NF)~~ Immediately after Abu Zubaydah was captured, CTC's [redacted] (CTC/[redacted] noted that he "has been a key player within the al-Qa'ida network for many years, and his longevity and level of importance within the network reflects his talents and abilities at leadership, organization, and commitment to the cause. Given his senior status in the al-Qa'ida organization and his key involvement in current operational planning by al-Qa'ida of possible massive terrorist attacks against US interests, we know he holds significant details that can disrupt and thwart future planned terrorist attacks."[9]

~~(TS/~~[redacted]~~/NF)~~ The problem was how to get him to talk about those operations. CTC was clearly worried about that: "We believe Abu Zubaydah is fully equipped to handle and deal with capture and interrogation, and will greatly resist cooperating with his debriefers as we try to elicit information from him."[10] When this assessment was written, on 29 March 2002, Abu Zubaydah had not yet been interrogated. He had been wounded in the capture operation, and several days passed before he was well enough to be questioned. CTC's concerns about Abu Zubaydah's ability to withstand interrogation stemmed from the capture of an al-Qa'ida manual in England in May 2000. This manual, when combined with other documents acquired over the years, suggested that "a sophisticated level of resistance training is available to high-risk Al Qaeda operatives" such as Abu Zubaydah.[11]

(U) Renditions and Detentions

~~(TS/~~[redacted]~~/NF)~~ [redacted]

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[redacted] At the beginning of the Agency's RDI program, the leaders of the intelligence oversight committees were Representatives Goss and Pelosi and Senators Graham and Shelby.[12]

~~(TS/~~[redacted]~~/NF)~~ [redacted] DCI Tenet also permitted the two most senior staff members of both committees to be briefed.[14]

~~(TS/~~[redacted]~~/NF)~~ [redacted]

~~(TS/~~[redacted]~~/NF)~~ [redacted]

~~(TS/~~[redacted]~~/NF)~~ Between 9/11 and the end of February 2002, CIA rendered more than [redacted] suspected terrorists to third countries, primarily to [redacted][18] The result was not particularly satisfactory, and little actionable intelligence to thwart planned attacks was acquired. Jose Rodriguez, a senior officer in CTC at the time of Abu Zubaydah's capture and soon to become Chief of CTC in May 2002, later wrote that "We couldn't control interviews done by others, had limited ability to ask time-urgent follow-on questions, and quite significantly, could not guarantee that the prisoner's rights were being respected."[19] The uncertainty associated with this process "made those of us in CTC very uncomfortable about contracting out the interrogation of our most important detainees," according to Rodriguez. "And therefore we pushed for the establishment of our own detention and interrogation facilities, the 'black sites'—facilities in a third country where detainees could be held and questioned in secrecy."[20]

(U) DCI Tenet confirms in his memoir that the intelligence take from al-Qa'ida detainees had been disappointing up that point but that with Abu Zubaydah, "Now that we had an undoubted resource in our hands—the highest ranking al-Qa'ida official captured to date—we opened discussions within the National Security Council as to how to handle him, since holding and interrogating large numbers of al-Qa'ida operatives had never been part of our plan. But Zubaydah and a small number of other extremely highly placed terrorists potentially had information that might save thousands of lives. We wondered what we could legitimately do to get that information."[21]

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(U) The Origin of EITs

~~(TS/~~[redacted]~~NF)~~ Tenet's question was not hypothetical because the interrogation of Abu Zubaydah was not going well. After his capture in Pakistan, he had been flown [redacted] where he underwent additional medical treatment in a [redacted] hospital for the wound he had suffered, before being placed in CIA's first "black site," codenamed [redacted] Briefers from CTC informed HPSCI and SSCI of Abu Zubaydah's capture on 10 April, noting that it was a "significant catch" but pointing out that "it appears that Zubaydah is skilled in counter-interrogation techniques."[22] Director of Congressional Affairs (D/OCA) Stanley Moskowitz sent congressional leaders and staffers, including Senators Ted Stevens and Daniel Inouye of SAC-D, Representative Jerry Lewis of HAC-D, and the staff directors and minority staff directors of both oversight committees, a memo on 30 May entitled "Interrogators Making Slow Progress With Abu Zubaydah." In it, Moskowitz wrote that "We assess that Abu Zubaydah has more critical information on threats to US interests. The interrogation team has observed Abu Zubaydah employ a variety of resistance techniques during debriefings....Abu Zubaydah may be stalling for time until ongoing operations are implemented."[23]

(U) The President was being kept up to date on the interrogation as well, and he was not happy with what he was hearing. "George Tenet told me interrogators believed Zubaydah had more information to reveal. If he was hiding something more, what could it be? Zubaydah was our best lead to avoid another catastrophic attack. 'We need to find out what he knows,' I directed the team. 'What are our options?'"[24]

~~(TS//~~[redacted]~~/NF)~~ In his memoir, Jose Rodriguez described the initial interrogation of Zubaydah as a disjointed effort, with representatives from the FBI, [redacted] and CTC all using different questioning methods and vying with each other to extract different kinds of information from him.[25] [redacted] of CTC/[redacted] agreed. "I'm not going to say it was a mess out there, there was just no structured program or plan...."[26] Several years later, [redacted] employed at the time of Zubaydah's capture as a contract operational psychologist with the Directorate of Science and Technology (DS&T) and a member of the CIA team sent [redacted] to interrogate him, told SSCI staffers that "CIA seemed to be trying to feel their way around with Abu Zubaydah" and that turf battles broke out between FBI and CIA officers. [redacted] said "FBI wanted to prosecute Zubaydah and was asking backward looking questions whereas CIA wanted intelligence to prevent the next attack." [redacted] had the impression that "neither CIA nor FBI were making much progress with Zubaydah."[27]

~~(S)~~ A large part of the problem was that CIA had had no experience with interrogations for many years. After the Vietnam War, experienced Agency interrogators largely left CIA or moved into other fields. In the 1980s, interest in interrogation developed again as a way of fostering foreign liaison relationships. The Agency developed the Human Resource Exploitation (HRE) program to train foreign liaison services on interrogation techniques.[28] CIA ended the HRE program in 1986 because of allegations of human rights abuses in Latin America.[29] At the time of Abu Zubaydah's interrogation, [redacted]

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~~(TS/~~[redacted]~~/NF)~~ As C/CTC, Rodriguez recalled members of the Abu Zubaydah interrogation team in June 2002 for a progress review. "It was clear to us that we had to do something to get the information flowing from AZ again."[31] CTC approached the DS&T's Office of Technical Service (OTS) about using [redacted] to design an interrogation program that would improve the chances for eliciting information from detainees. [redacted] had spent [redacted] working with the US Air Force's Survival, Evasion, Resistance, and Escape (SERE) program. In October 2001, he had entered into a contract with CIA to prepare a paper on al-Qa'ida's resistance to interrogation techniques. [redacted] worked with Department of Defense psychologist [redacted] who had [redacted] of experience in SERE training, to produce "Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective."[32] The two psychologists collaborated again and used their SERE experience to produce a list of 11 EITs. OTS then investigated the potential long-term psychological effects of these methods by soliciting information from psychologists, academic experts in psychopathology, and Department of Defense specialists in SERE training. OGC used this information in evaluating the legality of the techniques.[33]

~~(TS/~~[redacted]~~/NF)~~ One of the original 11 techniques, mock burial, was dropped early on because its inclusion would have slowed the legal approval process. The remaining ten were described to the Department of Justice for ruling on their legality:[34]

- *Attention Grasp*. Grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.

- *Walling*. The detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.

- *Facial Hold*. The interrogator places an open palm on either side of the detainee's face with the interrogator's fingertips kept well away from the detainee's eyes.

- *Facial or Insult Slap*. The interrogator's fingers are slightly spread apart, and his hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.

- *Cramped Confinement*. The detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space for up to 18 hours.

- *Insects*. Placing a harmless insect in the box with the detainee.

- *Wall Standing*. The detainee stands four to five feet from a wall with his feet spread approximately shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight.

- *Stress Positions.* The detainee sits on the floor with his legs extended straight out in front of him with his arms raised above his head or kneels on the floor while leaning back at a 45-degree angle.

- *Sleep Deprivation.* Not to exceed 11 days at a time.

- *Waterboard.* The detainee is bound to a bench with his feet elevated above his head. The detainee's head is immobilized, and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds, and the technique produces the sensation of drowning and suffocation.

(U) Legal Background for Use of EITs

~~(TS/~~[redacted]~~/NF)~~ [redacted]

~~(TS/~~[redacted]~~/NF)~~ Once [redacted] had developed their list of EITs, Rizzo and [redacted] CTC/Legal [redacted] met on 13 July with Bellinger, his deputy Bryan Cunningham, Yoo, DoJ attorney [redacted] Chertoff, and the FBI Director's chief of staff, Dan Levin. Rizzo and [redacted] briefed the group on the proposed enhanced techniques.[36]

~~(TS)~~ On 1 August, Assistant Attorney General Jay Bybee sent a memo to Rizzo reviewing the proposed EITs and concluding that the Agency could lawfully apply those methods in the interrogation of Abu Zubaydah. A cable was sent to [redacted] two days later summarizing the legal approval and providing specific guidance for the use of the EITs on Abu Zubaydah.[37]

(U) In his memoir, President Bush writes that he personally reviewed and approved the enhanced techniques, although he regarded waterboarding as particularly "tough." "I knew that an interrogation program this sensitive and controversial would one day become public. When it did, we would open ourselves up to criticism that America had compromised our moral values. I would have preferred that we get the information another way. But the choice between security and values was real. Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk that the country would be attacked. In the wake of 9/11, that was a risk I was unwilling to take. My most solemn responsibility as president was to protect the country. I approved the use of the interrogation techniques."[38]

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~~(TS/~~[redacted]~~/NF)~~ On 4 August 2002, the interrogation of Abu Zubaydah using the EITs began and concluded 26 days later. According to a summary of the types of interrogation techniques used that was prepared for DCI Goss in 2005, Abu Zubaydah was subjected to seven: facial hold, attention grasp, facial slap, stress positions, cramped confinement (small and large box), walling, and waterboarding.[39] CTC subsequently assessed that following the use of EITs, Abu Zubaydah developed into "our most cooperative detainee. AZ now helps us interpret sensitive al-Qa'ida communications and to indentify newly captured operatives....His knowledge of al-Qa'ida lower-level facilitators, modus operandi and safehouses, which he shared with us as a result of the use of EITs, for example, played a key role in the ultimate capture of Ramzi Bin-al-Shibh."[40]

(U) Initial Briefings to Congress

~~(TS/~~[redacted]~~/NF)~~ The interrogation of Abu Zubaydah using the EITs began while Congress was in its August 2002 recess. The first briefing in which the enhanced techniques were mentioned occurred on 7 August when C/CTC/OPS [redacted] and C/CTC/[redacted] briefed SSCI staffer [redacted] on CTC operations and staffing. In response to a question from [redacted] on what the committee could do for CTC, '[redacted] observed that it took a long time to get a legal opinion on the limits on using physical force (walling, attention getting, slapping, sleep deprivation) in interrogations," according to the MFR prepared by OCA about the briefing.[41]

~~(TS/~~[redacted]~~/NF)~~ The first briefing of oversight committee members occurred on 4 September 2002, when D/CTC Jose Rodriguez [redacted] CTC/Legal [redacted] and C/CTC/UBL Reports [redacted] [redacted] briefed HPSCI Chairman Goss, Ranking Minority Member Pelosi [redacted] [redacted] A cable summarizing the briefing noted that the Agency officers gave an overview of the history of the interrogation, the information acquired, the resistance techniques Abu Zubaydah had employed, and the reason for deciding to use the enhanced techniques. [redacted] provided background on the authorities for the use of the EITs, the coordination that had taken place with the DoJ and the White House, and a description of the enhanced techniques that had been employed. The cable noted that "The HPSCI attendees were particularly interested in the quality of material that Abu Zubaydah was now providing after the use of these measures."[42]

~~(TS/~~[redacted]~~/NF)~~ The SSCI leaders received the same briefing on 27 September, with DC/CTC [redacted] standing in for Rodriguez and joining [redacted] and [redacted] in briefing SSCI Chairman Graham, Vice Chairman Shelby, [redacted] [redacted] As with the earlier HPSCI briefing, a cable summarizing the briefing noted that the Agency officers provided a history of the Zubaydah interrogation, an overview of the material acquired, the resistance techniques Zubaydah had employed, and the reason for deciding to use the enhanced measures. As before, [redacted] provided background on the authorities for using the measures as well as the coordination process with the Department of Justice and the White House, and he described the enhanced techniques that had been employed.[43]

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~~(TS/~~[redacted]~~NF)~~ Following the SSCI briefing, [redacted] telephoned OCA on behalf of Chairman Graham and said the Senator wanted to have [redacted] and a former military interrogator interview CIA interrogators, visit [redacted] and observe an interrogation. C/CTC Rodriguez wrote in a memo to the DCI that "OCA advised that that would not be feasible; although [redacted] replied that the Senator would call to follow up, Graham has not done so, and CIA has heard nothing further on the matter from [redacted]

~~(TS/~~[redacted]~~NF)~~ On 20 November 2002, D/OCA Moskowitz notified the staff directors and minority staff directors of both oversight committees, Representative Lewis of HAC-D, and Senators Inouye and Stevens of SAC-D that the Agency had taken custody of another high-value terrorist, 'Abd al-Rahim al-Nashiri, and that it was "interrogating him at a covert location."[45] Al-Nashiri, thought to have been involved in the attacks on US embassies in East Africa and on the *USS Cole*, was captured [redacted] and turned over to CIA on [redacted] November. His interrogation began on the 15th; and he was subjected to several enhanced techniques: attention grasp, facial slap, confinement in both the small and large boxes, walling, stress positions, sleep deprivation, and waterboarding. (Information about the techniques was not provided to this group of briefees.)[46]

The First Problems in the RDI Program

(U) The first leak about the RDI program's existence came on 26 December 2002, when the *Washington Post* ran a story with the subtitle "'Stress and Duress Tactics' Used on Terrorism Suspects Held in Secret Overseas Facilities."[47] The article mentioned Abu Zubaydah's interrogation but gave no details about it.

~~(TS/~~[redacted]~~NF)~~ More troubling than the *Post* article were reports of unauthorized treatment of detainees. On 21 January 2003, Deputy Director for Operations (DDO) James Pavitt informed Agency Inspector General (IG) John Helgerson that Agency officers had used unauthorized and inappropriately intimidating treatment during al-Nashiri's interrogation. The next day, CIA General Counsel Scott Muller informed Helgerson that a detainee, Gul Rahman, had died while in captivity [redacted] at a covert detention facility codenamed [redacted] which [redacted] had opened in [redacted] 2002. Helgerson informed DCI Tenet on 23 January that "At the request and with the cooperation of the DDO and the GC, my office is now looking into these matters."[48]

~~(TS/~~[redacted]~~NF)~~ On 24 January, Muller, Rizzo, and [redacted] briefed Assistant Attorney General Chertoff, his deputy Alice Fisher, Deputy Assistant Attorney General Yoo and DoJ attorney [redacted] on both incidents. At the meeting, Rizzo noted the Agency's intention to notify the new leadership of the oversight committees as part of a previously planned briefing on interrogation practices.[49] That briefing took place on 4 February 2003 and was meant to introduce the new SSCI Chairman and Vice Chairman, Roberts and Rockefeller, to the EITs. Moskowitz, Pavitt, [redacted] and Muller briefed Roberts and staffers [redacted] the latter of whom was to fill in the absent Rockefeller.[50]

~~(TS/~~[redacted]~~/NF)~~ Pavitt told the group about the use of the unauthorized interrogation techniques on al-Nashiri—the cocking of pistol near his blindfolded face and the operation of an electric

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drill near him (the latter reportedly caused Roberts to wince). Pavitt noted that he had asked the IG to investigate the incident. Pavitt and [redacted] also covered "in detail" the case of Gul Rahman, who died at the detention facility [redacted] They reminded Roberts that a notification on the detainee's death was sent to the oversight committees in mid-November 2002 and said a further notification would be sent soon, given that the investigation into his death was near completion.[51]

~~(TS/~~[redacted]~~/NF)~~ In the remainder of the briefing, Pavitt and [redacted] described "in great detail" the importance of the information Abu Zubaydah and al-Nashiri had provided, including details of current terrorist operations; the difficulty of getting that information from them; and the importance of the enhanced techniques in obtaining it. Nevertheless, the Agency officers noted that even after the use of the EITs, it seemed clear that Abu Zubaydah and al-Nashiri had not revealed everything they knew of importance. After [redacted] mentioned that CIA had rendered [redacted] terrorists and detained 19, two of whom were in a special holding place, "Senator Roberts asked where they were located, but was told the [redacted] that the location not be revealed. The Senator had no problem with the answer."[52]

~~(TS/~~[redacted]~~/NF)~~ Next, the briefers described the enhanced techniques "in considerable detail, including how the waterboard was used," and Muller walked Roberts through the legal approval process the Agency had gone through with lawyers from the DoJ [redacted] before employing the enhanced techniques.[53]

~~(TS/~~[redacted]~~/NF)~~ Finally, Pavitt and Muller told the group that videotapes had been made of Abu Zubaydah's interrogation. Muller said the tapes had been reviewed by an OGC attorney, who compared the tapes to the interrogation reports and found them to be a perfect match. Moreover, the attorney was satisfied that the interrogations were carried out in accordance with the guidelines. Muller said it was the Agency's intention to destroy the tapes as soon as the IG had completed his report. "Senator Roberts listened carefully and gave his assent," according to the memo Moskowitz prepared after the briefing. Moskowitz noted that "Throughout the briefing Senator Roberts posed no objections to what he had heard. It seemed clear that he supported the interrogation effort."[54]

~~(TS/~~[redacted]~~/NF)~~ At the briefing, [redacted] asked Moskowitz whether he had "taken up the line" Senator Graham's request to do his own assessment of the enhanced interrogations. Moskowitz explained that the Agency would not support reading another staffer into the program or allow any staffer to view the interrogations or visit the clandestine site where the interrogations took place. "Quickly, the Senator [Roberts] interjected that he saw no reason for the Committee to pursue such a request and could think of 'ten reasons right off why it is a terrible idea' for the Committee to do any such thing as had been proposed. Turning to [redacted] he asked whether they thought otherwise and they indicated that they agreed with the Senator."[55]

~~(TS~~[redacted]~~/NF)~~ The following day, on 5 February 2003, the same group of Agency officers briefed HPSCI Chairman Goss, Ranking Minority Member Jane Harman, and staffers [redacted] The same topics were covered in this briefing: al-Nashiri's interrogation, the death [redacted] the importance of the information Abu Zubaydah and al-Nashiri provided, the enhanced techniques, and the Abu Zubaydah videos and CIA's intention to destroy them when the IG had concluded his investigation.[56]

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~~(TS/~~[redacted]~~/NF)~~ According to Moskowitz's handwritten notes, [redacted] briefed on the following EITs: attention grasp, walling, sleep deprivation, facial hold, facial slap, abdominal slap, cramped confinement, wall standing, stress position, diapers, insects, and waterboarding.[57] After hearing the description of the EITs, Representative Harman asked, "Why these techniques?" Muller replied that they stayed within the bounds of US law, and [redacted] noted that a contractor who had worked on SERE training with the US military saw that they worked on US soldiers. [redacted] described the program as "fairly effective" but noted that CIA believed Abu Zubaydah was still holding back information. On the death of Gul Rahman, [redacted] described [redacted] for the group and noted 17 terrorists were held there. Later in the briefing, Chairman Goss said that "We try to play by the rules" while our adversaries do not. According to Moskowitz's notes, Harman then said, "Some think not harsh enuf," apparently suggesting US tactics were thought by some to be not harsh enough to deal with the threat.[58]

~~(TS)~~ Five days later, on 10 February, Representative Harman wrote to General Counsel Muller, copying DCI Tenet. She began her letter by taking note of the fact that "we are at a time when the balance between security and liberty must be constantly evaluated and recalibrated" to protect the country from "catastrophic terrorist attack." She also noted that Muller had assured her at the recent briefing that "the eleven techniques approved by the Attorney General have been subject to extensive review by lawyers at the Central Intelligence Agency, the Department of Justice [redacted] and found to be within the law."[59] Harman went on to say, however, that

> what was described raises profound policy questions and I am concerned about whether these have been as rigorously examined as the legal questions. I would like to know what kind of policy review took place and what questions were examined. In particular, I would like to know whether the most senior levels of the White House have determined that these practices are consistent with the principles and policies of the United States. Have the enhanced techniques been authorized and approved by the President?[60]

~~(TS)~~ Muller responded on 28 February in only general terms. "While I do not think it appropriate for me to comment on issues that are a matter of policy, much less the nature and extent of Executive Branch policy deliberations, I think it would be fair to assume that policy as well as legal matters have been addressed within the Executive Branch."[61] At the conclusion to her letter to Muller, Harman had asked the Agency to reconsider its plan to destroy the Abu Zubaydah interrogation tapes, writing that "the videotape would be the best proof that the written record is accurate, if such record is called into question in the future. The fact of destruction would reflect badly on the Agency." Muller did not address the tapes issue in his response.[62]

Reaffirming the Program

~~(TS~~[redacted]~~NF)~~ Muller's oblique reference to policy deliberations in his response to Representative Harman probably referred at least in part to a meeting he attended with the DCI on 16 January 2003. Also present at the meeting were [redacted]

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[redacted] During the meeting, Muller pointed out "that there was an arguable inconsistency between what CIA was authorized to do and what at least some in the international community might expect in light of the Administration's public statements about 'humane treatment' of detainees.... Everyone in the room evinced understanding of the issue. CIA's past and ongoing use of enhanced techniques was reaffirmed and in no way drawn into question."[63]

(~~TS/~~[redacted]~~/NF~~) On 18 March 2003, Muller, Rizzo, and [redacted] again met again with DoJ officials Chertoff, Fisher, Yoo, and [redacted] and [redacted] to review several matters related to the Agency's counterterrorist [redacted] program. The DoJ attorneys confirmed that the Agency's use of enhanced interrogation techniques "continues to conform fully to U.S. law."[64] On 24 March, Muller and Rizzo briefed [redacted] on the Agency's interrogation program, with Chertoff, Fisher, and Yoo also present.[65]

(~~TS/~~[redacted]~~/NF~~) On 29 July 2003, DCI Tenet and General Counsel Muller met with [redacted], the Attorney General [redacted], and the Acting Assistant Attorney General to review the interrogation program. Muller provided an overview of the program, including the specific enhanced techniques and program safeguards, and noted that to date, 24 high-value detainees had been interrogated at CIA-controlled sites, and that 13 of them had been subjected to EITs. He provided a summary of the major threat information obtained through the interrogations and a list of the terrorists who had been interrogated, identifying those who had been waterboarded: Abu Zubaydah, al-Nashiri, and Khalid Shaykh Muhammad (KSM).[66]

(~~TS/~~[redacted]~~/NF~~) Muller's slide deck identified the enhanced techniques as follows:

- Slap (open-handed)
- Facial hold
- Attention grasp
- Abdominal slap (back-handed)
- Sleep deprivation over 72 hours
- Walling
- Stress positions
  - Kneeling
  - Forehead on Wall
- Cramped confinement (boxes)
- Waterboard (up to 40 seconds)

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(~~TS/~~[redacted]~~/NF~~) The slide deck also identified the use of the following "non-enhanced measures:"

- Sleep deprivation up to 72 hours
- Modified diet
- Loud noise/music under 79 decibels
- Constant light, constant dark
- Water dousing

(~~TS/~~[redacted]~~/NF~~) According to Muller's memo about the meeting, "The Attorney General forcefully reiterated the view of the Department of Justice that the techniques being employed by CIA were and remain lawful and do not violate either the anti-torture statute or US obligations under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment." At the conclusion of the meeting, "The DCI stated that it was important for CIA to know that it was executing Administration policy and not merely acting lawfully.[redacted][67]

(U//~~FOUO~~)[redacted]

(U//~~FOUO~~) On 4 September, Muller, accompanied by Pavitt and Moskowitz, gave the same briefing to HPSCI Chairman Goss and ranking member Harman, along with staffers[redacted] That afternoon, they gave the briefing to SSCI Chairman Roberts and Vice Chairman Rockefeller, along with unnamed staffers. Muller specifically noted that he used the same briefing slides with SSCI and HPSCI as he did with Powell and Rumsfeld. According to Muller, "None of the members expressed any reservations or objections to the Program."[70]

(U)[redacted]

(~~TS/~~[redacted]~~/NF~~) In April 2002,[redacted]had proposed the creation of a detention facility [redacted]to provide secure handling of terrorist detainees until Station personnel could determine the best disposition of the detainees. "The Station viewed the proposed facility as a way to maximize its efforts to exploit priority targets for intelligence and imminent threat information."[71] The first detainee arrived in[redacted]2002.

(~~TS~~[redacted]~~/NF~~) It was at[redacted]that Gul Rahman died on[redacted]November 2002. The previous afternoon, he had thrown his food, water, and defecation bucket at his[redacted]guards, and the site manager had authorized him to be "short-chained," which forced him to sit, naked from the waist down, on a concrete floor. The ambient temperature fell to 31 degrees that night, and Gul Rahman died

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of hypothermia.[72] The site manager at the time was a [redacted] operations officer.[73] As noted elsewhere in this study, the incident was briefed to the leadership of both oversight committees in February 2003.

(~~TS~~[redacted]~~/NF~~) The interrogation process at [redacted] improved significantly after Gul Rahman's death. CTC's Rendition and Detention Group (CTC/RDG) assumed responsibility for the management and maintenance of all Agency detainee interrogation facilities, including [redacted] on 3 December 2002. An assessment team visited [redacted] that same month and prepared a list of recommendations that regularized the interrogation process under Headquarters guidelines.[74]

(~~TS/~~[redacted]~~/NF~~) In [redacted] 2003, SSCI senior staffer [redacted] and SSCI General Counsel Richard Douglas visited [redacted] and asked for a tour of [redacted] The Chief of Station agreed, although he was somewhat taken aback by the request as he had been led to believe by Headquarters that only the SSCI chairman and vice chairman were aware of [redacted][75] The staffers toured the in-processing room, remote video-monitoring facility, interrogation rooms, and holding cells. A Station interrogator, who was a [redacted] explained that detainees were rewarded for increased levels of cooperation and that Headquarters approved all interrogations in advance. He told the staffers that Headquarters also provided specific approval and guidance when enhanced measures were to be employed and that at least [redacted] CIA officers, including both a medical professional and a psychologist, would be present at all interrogations. Any of the [redacted] could stop an interrogation at any time. Finally, the interrogator noted that the primary technique used at [redacted] was sleep deprivation, which achieved "most, if not all desired results."[76]

(~~TS/~~[redacted]~~/NF~~) Upon departing, the SSCI staffers compared the [redacted] facility with both the US military detention facility at Bagram [redacted] and the CIA-military facility at Guantanamo Bay. Both remarked that [redacted] "was a markedly cleaner, healthier, more humane and better administered facility."[77]

(U) Sea Change in Perceptions of RDI

(U) The Abu Ghraib scandal broke on 28 April 2004 when *60 Minutes* broadcast a segment showing disturbing images of prisoner abuse in the US military-run prison in Iraq. Overnight, the background against which actions in the fight against terrorism were judged shifted from the devastation of the 9/11 attacks to the images of Abu Ghraib. The Agency soon felt the impact of the change.

(U) A *New York Times* article on 6 May 2004 said Agency officials had briefed the SSCI the previous day on the "prisoner abuse issue." Senator Roberts, still the chairman, said to reporters, "So far there appears to be no evidence of intelligence personnel that directed any of the abuses, but the investigation does continue."[78] The same article revealed that the DoJ was examining the involvement of Agency employees and contractors in the deaths of three detainees, including one that occurred at Abu Ghraib.[79]

[redacted]

[redacted]

~~(TS)~~ [redacted]

(U) Later in May, newspaper articles appeared quoting FBI officials as saying CIA's interrogation techniques were too severe and "perhaps unethical," and a series of press reports in June suggested that the Bush Administration had created a legal foundation for the mistreatment of prisoners by inappropriately restricting the definition of torture in DoJ memoranda on interrogation tactics.[82] A *Washington Post* story on 8 June called one of the key DoJ memos that underpinned the Agency's authority to use enhanced techniques "justification for the use of torture."[83]

~~(TS)~~ The resulting furor in the media and among members of the Senate Judiciary Committee, in particular, caused the Administration to announce on 22 June that the DoJ would review and rewrite some of the sections in the legal opinions about interrogation practices.[84] The legal uncertainty had caused the Agency to suspend its interrogation program earlier in the month until the legal situation was clarified.[85]

~~(TS)~~ [redacted] DCI Chief of Staff John Moseman urged caution because of the waterboard's effectiveness with "at least one high value detainee."[86]

~~(TS/~~[redacted]~~/NF)~~ During the stand down, in response to the IG's review of the program (discussed below), the Agency studied its standard and enhanced interrogation techniques and decided to recharacterize three of its standard techniques—dietary manipulation, nudity, and water dousing—as enhanced techniques. It then sought DoJ legal review and approval of all 13 techniques. In May 2005, DoJ provided new legal opinions that none of the 13 techniques violated the federal torture statute and that none would constitute cruel, inhuman, or degrading treatment as defined by the US reservation to the Convention Against Torture.[87]

~~(TS/~~[redacted]~~/NF)~~ The 2004 stand down marked the peak of the RDI program. Although the Agency received positive legal guidance to proceed, only five terrorist suspects were interrogated using EITs following the stand down.[88]

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(U) The Inspector General's Special Review

(~~TS~~[redacted]~~NF~~) In January 2003, IG John Helgerson had initiated a review of Agency counterterrorism detention and interrogation activities after being informed of the death of Gul Rahman and the use of unauthorized interrogation techniques against al-Nashiri. The review was completed in May 2004 and, at the initiative of D/OCA Moskowitz, was briefed to the leadership of the HPSCI on 13 July and the SSCI two days later. (Helgerson had already briefed SSCI Chairman Roberts and Vice Chairman Rockefeller on 20 November 2003 on the results of his investigation into the al-Nashiri matter).[89] Helgerson was accompanied to the 13 July HPSCI briefing by Pavitt, Muller, OGC attorney [redacted] and CTC officer [redacted] while the HPSCI was represented by Chairman Goss, Representative Harman, and staffers [redacted][90]

(~~TS~~[redacted]~~NF~~) Helgerson began by noting that much had gone right with the debriefing and interrogation program, despite the fact that it had been created quickly. He mentioned that there had been considerable substantive success, with thousands of intelligence reports written as a result of the interrogations and other terrorists and terrorist cells run to ground. Helgerson also stated that the interrogations were legal, including the use of the enhanced techniques. He said that for the most part detainees at [redacted] and [redacted] the holding and interrogation facility [redacted] that replaced [redacted] had been well handled and that the detention and interrogation techniques used [redacted] [redacted] were not inhuman. He noted that no detainees who had been subjected to EITs had died.[91]

(~~TS/~~[redacted]~~NF~~) On the negative side of the ledger, the IG said that the DoJ memo from 1 August 2002, which provided the legal foundation for the interrogations, had not addressed Article 16 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. This article required signatory states to prevent in any territory subject to their jurisdiction acts of cruel, inhuman, and degrading punishment not amounting to torture, and he raised the question of whether CIA's use of the enhanced techniques violated US obligations under the provision.[92]

(~~TS/~~[redacted]~~/NF~~) Helgerson stated that three detainees had been waterboarded, and he believed that the technique had been used excessively on one prisoner, going beyond what had been agreed to with the DoJ. This was KSM, who received 183 applications over two weeks in 15 sessions.[93]

(~~TS/~~[redacted]~~NF~~) The IG also noted that the DCI had issued guidelines on conducting interrogations only in January 2003, seven months after they began, and addressing only those detained pursuant [redacted] Helgerson said that guidance in cables sent to the field evolved over time and did not reach everybody who was involved in interrogating detainees.[94]

(~~TS/~~[redacted]~~/NF~~) The IG concluded by stating that CIA needed a comprehensive document for interrogation personnel to consult that would cover both [redacted] and other debriefings, that the Agency needed to review the enhanced techniques to determine if they were effective and still necessary, and that there should be an updated and written DoJ opinion that reflected the actual practices of the enhanced techniques and the Article 16 issue.[95]

(~~TS~~[redacted]~~/NF~~) The representatives posed several questions to the briefers. Goss asked how many of the intelligence reports created from the detainee debriefings were "strategic" and

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how many were "tactical." (The briefers were not sure.) Harman asked when the Agency began using the enhanced techniques (with the Abu Zubaydah interrogation) and why the DCI's guidance on interrogations was issued so late (Pavitt explained that the "fury of activity" after 9/11 was to blame). Goss asked if the Agency's stand down on RDI activities included Guantanamo (no). Harman stated that the [redacted] did not specify interrogations and only authorized capture and detention and asked whether the Agency had questioned detainees before [redacted] had been issued (yes, but no enhanced techniques had been used before Abu Zubaydah; standing guidance with respect to [redacted] [redacted] period stated that only questioning was permissible).[96]

~~(TS/~~[redacted]~~NF)~~ Helgerson briefed SSCI leaders on the Special Review two days later, on 15 July. Other Agency attendees included Moskowitz, Pavitt, Muller, [redacted] and Philip Mudd from CTC. From the Senate side, Chairman Roberts, Vice Chairman Rockefeller, and staffers Johnson and [redacted] attended.[97] Moskowitz's handwritten notes indicate that Roberts asked why the use of EITs had been suspended. Muller said the Agency was waiting on the DoJ to issue new legal guidance. Rockefeller said that "we [CIA] need to avoid risk aversion" because of the impending change in legal guidance. An unidentified person from the SSCI side suggested it would be better to brief more members than just the chairman and vice chairman, allow congressional visits to the detention sites, and permit interviews of the interrogators. Pavitt said he could accept briefing more members, but that site visits were not feasible. Roberts opposed broadening access to the program for fear of leaks but said he would like to expand knowledge of the program to his chief counsel and one other staffer who had expertise in interrogation.

~~(TS~~[redacted]~~NF)~~ The next day, Helgerson summarized his thoughts about the two briefings to his staff.[98] He wrote, "Obviously, no member had read the report with great care, although all had seen staff summaries and some, especially Roberts and Harman, tended to leaf through the document and find issues that were of interest as we talked." He noted that the HPSCI session went on for more than two hours and included "in depth discussion of the practical, political, legal, and moral issues involved. Very little partisanship, except on the issue of whether to open the compartment up to all members—Harman advocates this; Goss is opposed." The IG noted that most of the discussion with the SSCI members focused on the legal ambiguity in the DoJ's position, the Agency's stand down on interrogation activity, and the implications of each. Roberts appeared to Helgerson to be particularly interested in whether some detainees were subjected to certain techniques on the basis of faulty analysis. "Overall, the discussion at the SSCI was more concentrated on getting the facts straight and less philosophical than with HPSCI, in part because the Senators had only about an hour to devote to this."

~~(TS/~~[redacted]~~NF)~~ In early March 2005, Helgerson followed up with separate briefings for Roberts and Rockefeller on the cases and projects pending in his office that were related to detention and interrogation issues. He spent an hour with Roberts and two hours with Rockefeller, noting that "The SSCI had previously been informed of all our cases and reviews, but I think it is safe to say the leadership had never really paid all that close attention until lately."[99]

(U) Almost a year later, on 9 May 2005, Rockefeller wrote DCI Goss requesting information and documents pertaining to the Special Review. D/OCA Joe Wippl responded on the 23rd that the materials would be made available at CIA only and that no copying or verbatim notes would be allowed.

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Rockefeller responded on 8 September protesting the restrictions and stating that they interfered with the committee's ability to carry out its oversight duties.[100]

(U) Problems on the Hill

(U) The *Washington Post* reported that Rockefeller sent a letter to Roberts in early February 2005 requesting that the committee review the presidential and legal authorities used by the Agency to carry out interrogations and renditions, and to review case studies of interrogation methods for their legality and effectiveness. Representative Harman requested that a similar study be undertaken by HPSCI.[101] Roberts responded publicly in March: "The Senate intelligence committee, along with the House intelligence committee, is well aware of what the CIA is doing overseas in defense of our nation and they are not torturing any detainee."[102]

(U) In April 2005, Rockefeller took the Senate floor to say that the detention and interrogation of suspected terrorists must be conducted "within the bounds of our laws and our own moral framework. Congress has largely ignored the issue. More disturbingly, the Senate Intelligence Committee…is sitting on the sidelines and effectively abdicating its oversight responsibility to media investigative reporters." Chairman Roberts responded from the floor that his committee had conducted "aggressive oversight of all aspects of the war on terrorism." He said an investigation would be unnecessary and "damaging to ongoing operations," and he concluded by stating that some had "almost a pathological obsession with calling into question the actions" of the intelligence community.[103]

~~(TS)~~ News reports indicated that Senate Majority Leader Bill Frist and Minority Leader Harry Reid planned to intervene to smooth over the growing dispute in the SSCI.[104] Probably to better inform himself about the substance Roberts and Rockefeller were arguing over, Frist and staffer [redacted] received a briefing from CTC officers [redacted] and [redacted] and CTC/Legal attorney [redacted] on 4 April. [redacted] the Agency officers did not brief Frist on interrogation techniques or the location of the detention sites, which neither the Senator nor his staffer asked about. Frist was, however, briefed on the operational, analytical, and legal aspects of the RDI program. [redacted] described the legal justification for the program and said that the detainees were not treated in accordance with the Geneva Conventions because they did not apply and contained requirements that were not consistent with [redacted] intelligence exploitation. At the conclusion of the briefing, Frist informed the team that he did not support Rockefeller's proposed detention probe.[105]

~~(TS~~[redacted]~~NF)~~ In this heated atmosphere, Agency officers prepared an extensive and detailed briefing for Roberts and Rockefeller in early 2005. (Although the briefing is dated February 2005, it apparently was not delivered until March 2005, probably on the 7th. Text in the briefing suggests it was also given to the chairman and ranking minority member of HPSCI, probably at roughly the same time.) The briefing, clearly marked as having been given to both senators, provided a background review beginning with [redacted] continuing through the legal justifications, the Abu Zubaydah case, and ending with a discussion of past problems. Internal controls and safeguards were described, such as the "least coercive measure" principle that required interrogators to begin with the least coercive techniques to transition detainees to normal debriefings.[106]

~~(TS/~~[redacted]~~/NF)~~ Renditions both before and after 9/11 were summarized, with the briefing mentioning that the Agency held 29 detainees in its overseas detention facilities at that time. The whole rendition procedure was covered, including the use of diapers and blindfolds or hoods with captured suspects as they were being transported to the holding facility. The rendition approval process was covered, and the senators were informed that the DCI had the authority to approve renditions if he determined that the terrorist suspect posed a serious and continuing threat of violence to US persons or interests—Principals Committee approval was not required. Interrogation results were covered extensively, and the briefing material emphasized that "We believe that detainee reporting has been a key reason why al-Qa'ida has failed to launch a spectacular mass casualty attack in the West since 11 September 2001." The EITs again were described comprehensively, including the three standard techniques the Agency had recently redefined as enhanced techniques: dietary manipulation, nudity, and water dousing. There is no record of questions or comments from the senators.[107]

~~(TS/~~[redacted]~~/NF)~~ Senator Rockefeller may not have been able to win enough support to start an investigation, but the pressure on the Bush Administration regarding the treatment of detainees continued unabated throughout 2005 from both the media and some members of Congress. In November, the *Washington Post* published an editorial entitled, "Central Torture Agency?"[108] In the Senate, momentum was building to introduce legislation that would limit the Administration's ability to evade application of the Geneva Conventions to the incarceration and interrogation of detainees. Several powerful Republican senators, foremost among them John McCain, supported the effort. As the Senate moved toward adopting legislation that would undercut the legal basis of the interrogation practices used in the RDI program, the Administration apparently tried to head it off by broadening access to information about the program, evidently hoping that would dampen the criticism and weaken support for new legislation. In October, the EITs were briefed to McCain, Senators Stevens and Thad Cochran from SAC-D, and in November to Frist and House Armed Service Committee Chairman Duncan Hunter.[109]

~~(TS/~~[redacted]~~/NF)~~ McCain was not swayed by his briefing, however, and he offered an amendment to the 2006 Defense Appropriations Act that undercut the RDI program's legal standing. On 8 November, HPSCI Chairman Hoekstra requested a briefing that covered the full and complete description of the 13 interrogation techniques authorized for use in the program. This was not Hoekstra's first briefing on the techniques—he had received one in January—but on this occasion he used the opportunity to ask about the potential impact of the McCain amendment. [redacted] CTC/Legal [redacted] advised Hoekstra that passage of the amendment would put Agency officers in a precarious legal position. "He was advised that in our view that risk was unacceptable and we would cease use of the techniques."[110]

~~(TS/~~[redacted]~~/NF)~~ When the McCain amendment passed, DCIA Goss notified Congress that "On 23 December 2005, the Director of the Central Intelligence Agency suspended further use of any of the Central Intelligence Agency's interrogation techniques pending an evaluation of whether the recently-enacted McCain Amendment to the Department of Defense Appropriation Act, 2006, changes the legal or policy underpinnings for the techniques, or the risk versus gain balance."[111]

Trying to Keep the Program Viable—While Searching for an Endgame

~~(TS/~~[redacted]~~NF)~~ As the new year began, CIA seniors were trying to build support in Congress for the continuation of the RDI program in the near term while working with the Bush Administration to develop an exit strategy for the long term. Thus, DCIA Goss met with the entire membership of the SSCI on 15 March 2006 to update the Committee members on the status of the program.[112]

~~(TS/~~[redacted]~~/NF)~~ Goss began by telling the Committee that it could be proud of the "professional manner in which the program has been managed, the care that is taken to ensure that CIA is strictly within the law, and the treatment of the detainees." He stressed that the program has provided "one of the best streams of intel available on the AQ network," before noting that he had suspended the use of EITs until a Department of Justice review of the implications of the McCain Amendment could be completed. Goss said that once the DoJ review had been completed, CIA would seek new authority from the administration to continue. The Director emphasized that, "CIA cannot go forward by ourselves. We need DoJ approval. We need administration concurrence. We need the support of our oversight committees."[113]

~~(TS/~~[redacted]~~/NF)~~ Goss said it was important to know whether the McCain Amendment was meant to show congressional disapproval of CIA's use of EITs. "I don't think so," Goss said, "but we need Congressional support for the program." He noted that the Agency was continuing to debrief detainees but that no interrogations were occurring. He also noted that the Agency was not bringing any new terrorist suspects into the RDI program. As a result, "We could be missing important intelligence," and he said that he would recommend that the RDI program be approved and restarted, although he noted that, because of the knowledge of al-Qa'ida the Agency had already gained, the threshold for placing new detainees into the program would be very high and therefore fewer would be brought into the program than in the past. He mentioned that because of a leak, we had lost significant detention space because our allies had subsequently asked the Agency to close its facilities. The Director concluded his opening remarks by saying that, due to NSC restrictions and our commitment to the Agency's foreign partners, CIA will still not be allowed to discuss site locations with the Congress.[114]

~~(TS~~[redacted]~~NF)~~ Committee members asked questions on a number of issues and made wide-ranging statements, but none of them were openly hostile toward the program. It was Vice-Chairman Rockefeller who perhaps most directly addressed Director Goss's concerns. The Senator stated his belief that the Agency, as a guiding policy, should brief the full SSCI membership, vice only the Chairman and Vice-Chairman, on controversial topics so that the entire committee is informed on issues where its support is needed, such as on the detainee issue. Rockefeller said that the Agency, by not briefing the entire Committee, had left a vacuum that others had filled with the passage of legislation. Finally, he noted the need for the Agency to develop an "end-game" strategy.[115]

~~(TS/~~[redacted]~~NF)~~ In fact, Agency seniors had been trying to work out an endgame strategy with the Administration since late 2004. Agency leaders reasoned that

- CIA has neither the mission nor resources to run covert prisons for long-term detention.
- Once high-value detainees (HVDs) are fully exploited for intelligence, CIA should not be the USG action element for continued detention.
- CIA's [redacted] partners who host detention facilities recognize that the USG has no HVD disposition plan.
- The USG's failure to develop an HVD endgame strategy is adversely affecting the risk tolerance of CIA's [redacted] partners, and the loss of partners will cause the collapse of the program.
- Establishment of an HVD disposition plan and detention facility to hold them would greatly reduce the scrutiny and strain on CIA's RDI program.
- Doctors and psychologists who support the detention program advise that continuing long-term isolated confinement of HVDs will cause their psychological and medical states to deteriorate, increasing the risk that detainees will become depressed, ill, or less productive as intelligence sources.[116]

~~(TS/~~[redacted]~~/NF)~~ By October 2005, Agency leaders had become seriously concerned by the lack of an agreed-upon endgame. They had learned that the *Washington Post* was about to publish an article [redacted] [redacted][117] Talking points prepared for the DCIA to be used at a Principals' Committee meeting on 28 October said in part, "The Central Intelligence Agency currently holds 27 detainees taken off the battlefield on the War on Terror. Over a year ago, CIA sought [redacted] decision to resolve the situation. However, at that time, [redacted] given the complexity of the variables and potential implications. Given a confluence of circumstances—anticipated publication of a *Washington Post* (or any media outlet) article [redacted] [redacted]—resolution of an end-game strategy is no longer theoretical but is upon us **now**" (emphasis in original).[118]

~~(TS/~~[redacted]~~/NF)~~ When new DCIA Hayden, who took over from Goss on 30 May 2006, met with SSCI Chairman Roberts on 7 June, he similarly expressed his strong desire "to get CIA out of the business of being 'the nation's jailer.'" He sought Roberts' advice on how to share details of a proposed modified program of EIT use with other senators who were interested in the EITs, and he agreed that it might be wise to brief the entire membership of the SSCI on the RDI program's history—except for specific locations of detainees.[119]

~~(TS/~~[redacted]~~/NF)~~ Hayden expressed the same views on developing an endgame to HPSCI leaders Hoekstra and Harman when he met with them the next day. As with Senator Roberts, he asked for Chairman Hoekstra's views on how to brief HPSCI on EITs: just the Chairman and Ranking Member or the entire committee. Representative Harman asked if the new EITs would be consistent with the McCain Amendment, and the Director assured her that they would, noting that DoJ continues to state that the entire program was and will continue to be lawful.[120]

The Supreme Court Intervenes

(U) On 29 June 2006, the Supreme Court decided in the case of *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Convention applied to the conflict with al-Qa'ida, contrary to the position previously held by the Administration. Common Article 3 requires that detainees "shall in all circumstances be treated humanely," and prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment" and "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." President Bush wrote in his memoir that, as a result of the Supreme Court decision, "CIA lawyers worried that intelligence personnel who questioned terrorists could suddenly face legal jeopardy." The decision thus reinforced the uncertainty introduced by the McCain Amendment on this score.[121]

~~(TS/~~[redacted]~~NF)~~ In a briefing to Senators Roberts and Rockefeller on 11 July, Director Hayden discussed the implications of the Supreme Court's ruling and of the McCain Amendment. He told the Senators that 26 detainees were currently in CIA custody but that he had just signed paperwork to render four of these to their home countries: [redacted] Senator Rockefeller asked whether these renditions were being done with "a wink" toward their human rights, but the Director replied that the US government had received assurances from the countries of origin that they would not release these detainees nor violate their human rights.[122]

~~(TS~~[redacted]~~NF)~~ Director Hayden went on to say that no EITs had been utilized since 23 December 2005 and no new detainees had entered the program since that time. He said the Agency was contemplating resuming an EIT program using only techniques 1 through 7, which, he estimated, would allow it to capture "80-90 percent of the intelligence of value." "Techniques 1 through 7" became shorthand in briefings on the Hill for the following EITs: sleep deprivation, dietary manipulation, nudity, facial grasp, facial slap, abdominal slap, and attention grasp. The Director argued that there must be broad agreement within Congress that some sort of enhanced interrogation program is needed. Senator Rockefeller replied that "removing EITs 8-13 might ease pressure here in Congress and internationally," but General Hayden worried that "international pressure, especially [redacted] would be quite high if any CIA program were made public, arguing that human rights groups and others would assume the entire program was about waterboarding." EITs 8 through 13 came to be the shorthand used to discuss the harsher EITs: walling, water dousing, wall standing, stress positions, cramped confinement, and waterboarding.[123]

~~(TS/~~[redacted]~~NF)~~ Finally, DCIA Hayden depicted his desired endgame for the program by saying he would "return the empties"—those detainees who no longer have intelligence value—to their home countries, encourage DoJ to indict others in US courts or in military tribunals, and send the remaining detainees to Guantanamo Bay if they are too dangerous to be released from US custody or are of continuing intelligence value.[124]

(U) From President Bush's perspective, however, the Supreme Court's decision made it all but impossible to maintain the secrecy of the CIA's program. "The Supreme Court decision made clear it was time to seek legislation codifying the military tribunal system and CIA interrogation program. I took the issue to the people with a series of speeches and statements." The most dramatic of these came on 6 September 2006, when he publicly disclosed the existence of the CIA's detention and interrogation program and announced that KSM and thirteen other al-Qa'ida detainees would be transferred from CIA custody to Guantanamo Bay under DoD custody.[125]

~~(TS/~~[redacted]~~NF)~~ September 6 was a busy day for the DCIA, as he briefed Senate leaders Frist and Reid, Representative Harman, the full SSCI, and the full HPSCI on the RDI program, including the use of EITs. Director Hayden provided a detailed accounting of the 96 detainees over the life of the program for Senators Frist and Reid, including the number who received EITs and by name those to whom the most coercive EITs were employed. The Director described the program's success at length—noting in particular that the IC had received 1,000 intelligence reports alone from KSM's debriefings—but said that CIA currently held no detainees and would not take new terrorists into the program until Congress passed necessary legislation. General Hayden named all EITs and provided a description of most of them, prompting Senator Reid to ask if waterboarding would be included in a future program. The DCIA said it would not, noting that it had been used on only three detainees and was last done more than three years ago. Senator Frist asked if the program was permanently terminated, to which the DCIA said it was the Agency's intent, Congress willing, to continue to capture and debrief high value terrorists. General Hayden said that the Agency had identified approximately 18 individuals that it would like to put in the program if they could be caught but that CIA would not resume the program without first consulting the Congress.[126]

~~(TS/~~[redacted]~~NF)~~ Director Hayden provided the same briefing to Representative Harman. Harman said she had been told that Abu Zubaydah was "brain damaged," of no intelligence value and a "frivolous" character, to which the DCIA responded, "absolutely untrue." CTC officer [redacted] then provided examples of the intelligence acquired from Zubaydah. Like Senator Reid, Congresswoman Harman asked if waterboarding would be included in a future program, to which General Hayden gave the same response: no.[127]

~~(TS/~~[redacted]~~NF)~~ The Director then provided essentially the same briefing to both the full SSCI and the full HPSCI. Director of Congressional Affairs Chris Walker, in his memo summarizing the meeting, wrote that the general tone of the SSCI briefing was positive but that most members had just returned from a month-long recess and were not up to date on detainee matters. The meeting lasted only 60 minutes, and after the DCIA had finished his briefing, each Senator had only two minutes in which to ask questions. On this occasion, General Hayden mentioned that 8,000 intelligence reports had been disseminated from the program, especially through the use of EITs, and that many of the techniques employed in the RDI program are used against students in the USAF survival school. The DCIA stated that in a future program, there would be only seven EITs, and that waterboarding would not be one of them. He affirmed that CIA would not resume the program without consulting Congress and would inform the oversight committees when a terrorist was brought into the program, when any EITs were employed, and when anyone was released from the program.[128]

~~(TS/~~[redacted]~~NF)~~ As with the SSCI, HPSCI members had just returned from recess and were not up to date on detainee affairs. Walker notes that the general tone of the HPSCI briefing was also

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positive, with only Representatives Eshoo and Tierney expressing significant opposition to the program. General Hayden went into great detail on waterboarding and water dousing in response to questions. As before, he said CIA would not resume the program without first consulting the Congress.[129]

~~(TS/~~[redacted]~~NF)~~ The next day, September 7, the Director met with Senator McCain and offered him an extensive briefing on the program by CTC, which took place on the 11th. At its conclusion, the Senator said he was certain of the Agency's professionalism, high standards, and the internal and external oversight of the program, but that he could not in good conscience support its efforts in this regard.[130]

Hoping for A New Lease on Life, While Questions about Videotaping Interrogations Arise

~~(TS/~~[redacted]~~NF)~~ In October 2006, the Congress passed the Military Commissions Act, and the Administration began drafting an Executive Order which eventually became Executive Order 13440 of July 20, 2007. The combination of these measures was viewed by Agency leaders as sufficient legal protection for the resumption of the program. Thus, when DCIA Hayden met with the full SSCI on 16 November 2006, he told the members that, after the President signed the Executive Order, which he expected, incorrectly as it turned out, would be in two weeks, he would ask DoJ to determine if the EO and CIA's proposed use of EITs 1-7 are legal, and that he fully expected DoJ to confirm their legality. He handed each of the members a one-page document describing each of the proposed 7 EITs and told them that walling, water dousing, wall standing, stress positions, cramped confinement, and waterboarding would not be used in the future. He reminded the members that of the 96 detainees, only 30 had been given EITs, and only 3 had been waterboarded. He said the Director must approve the use of EITs in advance and that CIA will employ the least coercive EITs first, if at all, noting that generally four days of EITs are enough to gain cooperation. Senator Hatch asked if the Agency should not get a DoJ opinion on all 13 EITs, and Senator Rockefeller said that he, too, thought the Agency should get a DoJ opinion on all 13. "What if the White House asks CIA to employ additional EITs?" he asked.[131]

~~(TS/~~[redacted]~~NF)~~ Senator Feinstein asked a number of questions and made several comments during the session. "There is a limit needed on the amount of sleep deprivation," to which the Director said that the previous program provided up to 180 hours of sleep deprivation (KSM went 180 hours) but that CIA is now proposing a limit of 96 as a result of the wording of the Military Commissions Act. Anything further will require DCIA permission. Senator Feinstein then asked if detainees are fed during sleep deprivation, and General Hayden said they receive 1,000 calories a day of Ensure. Next, she asked if the EITs are ranked in any particular order and how the Agency guards against abuse. The DCIA responded that the individual interrogation teams decide the best course of action and then their proposal is sent to the DCIA for approval. CTC officer [redacted] added that no one person alone can administer EITs, so there are checks and balances. The Senator asked about nudity and whether the Agency ever had personnel of the opposite sex present, saying that the Agency should not have women officers with male detainees, and the Director replied that some of CIA's best interrogators were females but that he would take the Senator's question and consider it further.[132]

Third-agency review pending

~~(S NF)~~ Close to the end of the session, Senator Bond asked, "Are these interrogations videotaped?" [redacted] [redacted] responded, "No, sir, they are not videotaped today. They are monitored on closed circuit television." After further dialogue between DCIA Hayden and Senator Bond, in which the DCIA sought to affirm that the interrogation techniques did not violate the law, Senator Rockefeller interjected, "I accept that, but I'm still nervous. Just as an observation. I think videotaping is useful.... I'm just saying in general, both for the protection of the CIA people, for knowing exactly what was said and with what nuance, etc., it seems to me it would be very useful. I can't understand why you wouldn't tape." [redacted] responded, "Sir, I believe if we did tape the interrogation it would have a dampening effect on the interrogators and how we are attempting to obtain the information. By that I mean that I think that we would always be thinking that there is some reason you would not go to the limit, well within the law and well within the boundaries." Rockefeller was not convinced after further dialogue and ended the discussion by saying, "I don't know why you wouldn't want to do it."[133]

~~(TS/~~[redacted]~~NF)~~ Director Hayden used a portion of the session to inform the Committee of the capture of a new HVD, Abd al-Hadi al-Iraqi. The DCIA said al-Iraqi was cooperating with his Agency interrogators and that they saw no reason to use EITs with him at the moment. He then took the opportunity to describe the conditions of confinement that are applied to all detainees, including shaved head and beard, continuous lights, goggles during transit, closed circuit TV monitoring, white noise in the cell, and shackles during movement, noting that the Department of Justice had determined that these conditions individually and when taken together are consistent with the Geneva Convention.[134]

~~(TS/~~[redacted]~~NF)~~ Later that same day, during a briefing for the HPSCI, members from both parties asked why CIA was not videotaping the interrogations. Specific questions were asked by Representatives Hoekstra, Holt, and Issa. Chairman Hoekstra asked if the interrogation of CIA's latest HVD, Abdul Hadi al-Iraqi, would be videotaped, to which the DCIA responded, "They are being monitored by the closed-circuit TV, and there is always someone else watching what is going on." Hoekstra said that if closed-circuit TV is used, there should be videotapes, but the Director responded, "no." Representative Holt then asked if CIA might consider videotaping in the future, to which General Hayden responded that he would consider the issue further and return to the HPSCI with additional information about videotaping detainees.[135] When the Director briefed new HPSCI Chairman Silvestre Reyes on 19 December, Reyes also asked if the interrogations were videotaped, to which Hayden responded "no," but he added that he had "asked for an opinion within CIA but that he 'hadn't circled back yet.'"[136]

~~(TS/~~[redacted]~~NF)~~ Ironically, the videotapes that had been made of Abu Zubaydah's interrogation had been destroyed almost exactly one year earlier, on 9 November 2005, at the order of D/NCS Jose Rodriguez. (Al-Nashiri's interrogation had also been taped, but the tape was reused each day after it had been reviewed for note taking purposes.) Although Agency briefers had informed the leadership of the oversight committees of the tapes' existence and the Agency's intention to destroy them in February 2003, resistance to their destruction within the Agency, in the White House, and from the DNI had led to temporizing on the issue. When Rodriguez finally ordered their destruction, his move took both Acting General Counsel John Rizzo and DCIA Goss by surprise. When he was told of their destruction, Goss stated his intention to inform congressional leaders, but there is no record that he actually did so, and he had no clear memory of having done so when queried by DCIA Hayden about it in December 2007.[137]

~~(TS/~~[redacted]~~/NF)~~ Agency leaders began setting the record straight about the tapes the following spring. During a 14 March 2007 HPSCI hearing on renditions, Congressman Issa asked about videotaping, to which DCIA Hayden responded, "We have videotaped and the tapes no longer exist—and this is 4½, 5 years ago—the first two detainees. And it was done not for the reasons you are describing, but to have a record of what was said by the detainees so we got all the intelligence. It was found that it wasn't of any use. We just didn't need it, and so we just stopped doing it."[138]

~~(TS/~~[redacted]~~/NF)~~ Congressman Holt then commented that videotaping has turned out to be beneficial to US local law enforcement, and Representative Issa followed up again as to why he believed videotaping would be beneficial to CIA. Director Hayden responded: "Congressman, I take it, made a note. I will once again readdress it. I will tell you that when we have talked about it at home before, the issue has been security and the potential danger to the interrogator or his family if this ever leaked and was made available, put on the Web, great danger that that would entail, one. Secondly, even if we do these techniques precisely as they are described, it is not going to look pretty. And if that were ever leaked or made public and put on jihadist Web sites, it would be another propaganda tool. I am not saying that is a conclusive argument, just saying that is where the discussion was currently. Let me take it back and do what you have asked, and I will get back to you directly."[139] CTC responded to Congressman Holt on 19 March with a paper entitled, "Why CIA Does Not Videotape Interrogation Sessions." In it, CTC noted that, "CIA only videotaped the interrogations of two detainees during the history of the program—Abu Zubaydah, the first detainee in the program, and al-Nashiri, the second detainee in the program. The tapes proved not to be useful for intelligence purposes and thus the practice was not continued and the tapes were destroyed."[140] Director Hayden repeated the same message almost verbatim for Representative Issa in a letter dated 19 April.[141]

~~(TS//~~[redacted]~~/NF)~~ Surprisingly, the question of videotaping appears not to have come up at either of the SSCI hearings held in early 2007, on February 14 and April 12. Thus, the first opportunity to clarify the record fell to CTC attorney [redacted] who briefed a total of 15 SSCI staffers into [redacted] on 16 March and 9 April. He discussed with them the existence of, and the destruction of, the Abu Zubaydah videotapes.[142] The next recorded mention of videotaping in a SSCI session came on 14 November 2007, when the key contractors involved in the RDI program, [redacted] were called to brief the SSCI staff on the program. Staff director [redacted] asked them about the decision to videotape the sessions. The contractors responded that the videotaping was initiated due to concerns about the English skills of Abu Zubaydah and al-Nashiri. CIA officers did not want to miss any information and the videos would enable a review of the sessions. [redacted] said they believed it was stopped because the tapes were not being used.[143]

Opposition Grows in the SSCI

~~(TS/~~[redacted]~~/NF)~~ On 14 February 2007, Director Hayden gave SSCI members a comprehensive briefing on renditions from 1987 to 2007. OCA's report on the session said that, "Overall, the hearing was well received by members both for the amount of written information provided by CIA and the candor in which CIA witnesses discussed the program." The Committee submitted a number of questions for the record, most having to do with CIA's knowledge of the treatment of detainees who had been rendered to third countries, but unfortunately, the OCA memo does not contain the specific questions or comments of individual members. It says only that "Chairman Rockefeller and Vice Chairman Bond's opening statements acknowledged the importance of rendition as a tool to gather intelligence in the War on Terror. Both, however, expressed concerns regarding specific aspects—both real and perceived—of the program."[144]

[redacted]

(U) By the time the next meeting with the SSCI was held, on 12 April, the atmosphere in the Committee had begun to change, as more members began to express skepticism about the RDI program. This was also true of the HPSCI. In the interim, KSM had appeared before a military tribunal in the detention camp at Guantanamo Bay, where "he presented a written statement alleging mistreatment during his captivity prior to arriving at Guantanamo," according to two members of the Senate Armed Services Committee who witnessed the proceedings, Carl Levin and Lindsey Graham. "Allegations of prisoner mistreatment must be taken seriously and properly investigated," said the Senators.[146]

(U) Subsequent media coverage, in the United States and abroad, focused further attention on KSM's treatment during the period he was held in Agency detention. The London *Daily Telegraph* wrote that it hardly mattered whether he was guilty since "the world will condemn the procedures by which the verdicts were reached," while the *Frankfurter Allgemeine Zeitung* wrote that "the Bush administration has nobody but itself to blame for the fact that the actions and motives of the perpetrator are now playing second fiddle to the practices used by the Americans in fighting terrorism."[147]

(U) At home, the *Washington Post* published a column by Anne Applebaum entitled "Tortured Credibility" in which she claimed the "international indifference" to KSM's confession to having planned the 9/11 attacks "surely comes from the widespread, indeed practically universal, assumption that

Mohammed was tortured…." She went on to say, "Even if we were to give the administration the benefit of the doubt, which hardly anyone will, the circumstances of Mohammed's detention have been unacceptable by American standards. Even if he was not tortured, he was held in secret, extralegal and completely unregulated conditions…certainly under nothing resembling what we in the United States normally consider the rule of law…. The mystery surrounding his interrogation—when it was carried out, how and by whom—renders any confession he makes completely null, either in a court of law or in the court of international public opinion."[148]

(U) Similarly, the editorial board of the *New York Times* wrote that "The omissions from the record of Mr. Mohammed's hearing were chilling. The United States government deleted his claims to have been tortured during years of illegal detention at camps run by the Central Intelligence Agency. Government officials who are opposed to the administration's lawless policy on prisoners have said in numerous news reports that Mr. Mohammed was indeed tortured, including through waterboarding, which simulates drowning and violates every civilized standard of behavior toward a prisoner, even one as awful as this one…. The Bush administration has so badly subverted American norms of justice in handling these cases that they would not stand up to scrutiny in a real court of law. It is a clear case of justice denied."[149]

~~(TS/~~[redacted]~~/NF)~~ It is perhaps not surprising, therefore, that Chairman Rockefeller opened the hearing on 12 April by saying that even if the Agency could convince the Committee that the detention program is legal and legitimate in a secret setting, the CIA will still have a "black eye" with the public. Regardless of whether or not the Agency has broken international law through the program, he went on to say, the US should still abide by international norms. Is the program worth the risk of the US's reputation, he asked? There is no record of a direct response from DCIA Hayden, who then presented his statement on the program's past and his expectations for its future, once again handing out a chart of EITs 1-7. Acting Assistant Attorney General for the Office of Legal Counsel Stephen Bradbury attended the session and stated that it was his preliminary opinion that the techniques were legal.[150]

~~(TS/~~[redacted]~~/NF)~~ Soon after the hearing, Senator Feingold wrote to Director Hayden to express his opposition to the program. "I am deeply troubled by the CIA's use of 'Enhanced Interrogation Techniques,' including those authorized since the inception of the program and those the CIA proposes to use in the future. Simply put, I do not believe they are consistent with our values as a nation. Nor do I believe that the American people, were they to be fully informed of these techniques, would find them acceptable, regardless of the individuals to whom they are applied."[151]

~~(TS~~[redacted]~~/NF)~~ Within days, Senators Feinstein, Wyden, and Hagel jointly wrote to the Director to express their opposition to the program's continuation as well. "It is inevitable that details of the detention and interrogation operations will become public eventually…. We believe that the public reaction to this information, both domestically and around to [sic] the world, will be catastrophically damaging." They went on to say that they found Bradbury's explanation of the legality of the techniques to be "unduly confusing and evasive," and that they "have deep discomfort with the use of EITs. We understand that the CIA has detailed procedures on how these techniques are to be used and on the oversight of these techniques. However, it is one thing to describe or demonstrate a slap or grasp in our offices or hearing room, it is another for such actions to be performed against a known terrorist in a highly secret facility according to procedures drafted thousands of miles away. There have been abuses in this

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program in the past, albeit before the current framework was put in place. There could be abuses in the future. Such abuses, to us, constitute torture in those instances."[152]

The Program is Restarted—and Criticism Mounts

~~(TS/~~[redacted]~~/NF~~) On 20 July 2007, President Bush signed Executive Order 13440, giving the Agency the legal authority to restart the RDI program. The Agency ultimately decided to use only six EITs henceforth, certified as legal by the Department of Justice: sleep deprivation, dietary manipulation, attention grasp, facial hold, facial slap, and abdominal slap.[153]

~~(TS/~~[redacted]~~/NF~~) The HPSCI met on the Executive Order four days later, and it was a contentious and difficult meeting for the Agency's briefers, C/CTC [redacted] and [redacted] [redacted] OCA's summary of the session conveys the atmosphere: "This briefing…went as well as could be expected given the strong personal views of some members concerning RDI, and the fact that the topic evokes rhetorical and emotional reactions among Members." The Agency briefers "did a very good job of responding to Member questions (which were often repeated several times) and remaining focused in spite of the occasional sarcastic and hostile tenor of some of those questions."[154]

~~(TS/~~[redacted]~~/NF~~) Members asked about the legal underpinning of the Executive Order; implementation of guidelines; oversight and accountability; application of EITs and the approval process; whether previous, discontinued EITs were deemed unlawful; the value of the program; use of contract personnel; conformity with Geneva Convention Common Article 3; the impact of public disclosure of program details; and ICRC access to detention facilities.[155]

~~(TS/~~[redacted]~~/NF~~) The OCA note taker wrote that a comment by Representative Holt was illustrative of the strong views held by some members: "In your case, the Geneva Convention doesn't apply. We put our soldiers at risk and have ruined the reputation of the United States in the eyes of the world. We disappear people. We use torture and there is a risk posed to our national security. It's unfathomable. Just think where…you have taken this country. I weep."[156]

~~(TS/~~[redacted]~~/NF~~) The SSCI held its meeting on the new Executive Order on 2 August, and [redacted] and [redacted] again represented the Agency, while Steven Bradbury from DoJ also attended. The Committee also asked to be briefed on the recent capture of a HVD, Mohammad Rahim. Chairman Rockefeller began the session by posing several questions, including, "Should the US be comfortable with allowing other countries to use similar such tough techniques on US citizens in detention? If these techniques are lawful, why should no police use them, for example against an abductor of children? What is the approval process for the use of the techniques?"[157]

~~(TS/~~[redacted]~~/NF~~) In his opening statement, [redacted] spelled out the guidelines for the program:

- All program personnel must be screened by the Office of Medical Services Psychology Staff to ensure suitability.

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- Interrogators are required to complete 280 hours of training.

- Senior officers at the detention site and at Headquarters must monitor officers' compliance with all guidelines.

- The team concept will be used in interrogations, meaning there are number of officers involved in the planning, conduct, and monitoring of interrogations.

- Medical and psychological professionals are present to ensure the safety and health of detainees; they have the authority to terminate any session or technique if there are medical or psychological contraindications to continuation.

- Program management is required to conduct internal reviews and to keep detailed records, including on the physical and mental health of detainees.[158]

~~(TS/~~[redacted]~~NF)~~ [redacted] then outlined the approval process for the use of EITs:

- Every detainee must be given the opportunity to answer questions in a neutral, non-threatening environment.

- Only if the detainee declines to answer, or provides false answers, may the interrogation team develop an interrogation plan that is tailored to the specific detainee.

- The plan must be reviewed by C/CTC, D/NCS, and the General Counsel.

- The DCIA must approve the use of the plan. In approving the plan's implementation, the Director must find that the detainee is believed to possess information about terrorist threats to the US or its interests, or that would assist in locating Usama bin Ladin or Ayman al-Zawahiri.[159]

~~(TS/~~[redacted]~~NF)~~ Committee members asked many questions, some of them phrased skeptically, about the legal authorities and the EITs, but there apparently was not the outpouring of emotional opposition to the program that occurred in the HPSCI meeting. With regard to new HVD Mohammad Rahim, [redacted] said the Agency had taken custody of him on [redacted] July from [redacted] After the Executive Order was issued and the Director had prepared the guidelines summarized above, the interrogation team proposed a plan using all six EITs, which the Director approved. Nevertheless, Rahim continued to resist cooperating, according to [redacted][160]

Destruction of Interrogation Tapes Blows Up into a Full-Fledged Storm

(U) The *New York Times* published an article on 7 December 2007 revealing that the Agency in 2005 had destroyed videotapes of interrogation sessions, which raised "questions about whether agency officials withheld information from Congress, the courts and the Sept. 11 commission about aspects of the program," according to the *Times*.[161] The article implied that, had the tapes been made available to the public or to oversight bodies, they would have created an outcry against the "severe" and "harsh" interrogation methods used.

(~~TS~~) Three days before its publication, HPSCI Staff [redacted] and [redacted] [redacted] who had been contacted by the author of the article, spoke with OCA about it. [redacted] said Chairman Reyes was aware of the forthcoming article and that the Committee did not "want to see a [CIA] response which includes a 'the committees were briefed' statement." They said such a statement would cause the members to say they were not briefed. [redacted] also said that a "no comment" response would make it difficult for the Committee. He urged the Agency to confirm the fact that the tapes existed and to say they were destroyed to because of the risk posed to Agency officers on the tapes.[162]

(U) In a statement to the Agency workforce on 6 December that was also made public, Director Hayden anticipated that the forthcoming *New York Times* article would create a sensation and provided general background on the interrogation program. He said that the tapes were destroyed "only after it was determined they were no longer of intelligence value and not relevant to any internal, legislative, or judicial inquiries" and that "the leaders of our oversight committees in Congress were informed of the videos years ago and of the Agency's intention to dispose of the material. Our oversight committees also have been told that the videos were, in fact, destroyed." He went on to state that, "Were they ever to leak, they would permit identification of your CIA colleagues who had served in the program, exposing them and their families to retaliation from al-Qa'ida and its sympathizers."[163]

(U) The very next day, Chairman Reyes and Ranking Member Hoekstra wrote to the DCIA protesting the contents of his statement. "The implication of this statement is that Congress was fully informed as to the practice of videotaping interrogations and notified 'years ago' as to the destruction of the videotapes. Based upon available records and our best recollection, this simply is not true. This Committee was not informed of the decision to destroy these videotapes until earlier this year. The notification came in the form of an offhand comment you made in response to a question during a briefing on March 14, 2007. The destruction was briefly mentioned again in a letter to one Member of this Committee dated April 19, 2007. We do not consider this to be sufficient notification. Moreover, these brief mentions were certainly not contemporaneous with the decision to destroy the videotapes."[164]

(U) On 10 December, Congressman Hoekstra followed up with another letter to the Director: "Last Friday, Chairman Reyes and I wrote to you to urge you to publicly correct statements made to the CIA workforce and to the public that the congressional Intelligence Committees were informed that the CIA had destroyed videotapes made during detainee interrogations. It is completely unacceptable that you not only have not yet publicly corrected that statement, but that your spokesman continues to incorrectly assert to the news media that the Committees were informed. Let me reiterate this unambiguously—as Chairman of the Committee in 2005, I was never specifically informed of either the existence of these tapes or that they had been destroyed over the objections of Committee leaders who had previously been briefed with respect to the tapes."[165]

(~~TS/~~[redacted]~~/NF~~) Also on December 10, SSCI Chairman Rockefeller and Vice Chairman Bond wrote to the Director and asked him to appear the next day before the Committee. "Specifically, we wish to know the number of recordings made of each detainee; when these recordings were made and why; when the recordings were destroyed and why; and when both the creation and destruction of these recordings was briefed to Congress."[166] Chairman Rockefeller opened the session on the 11th by chastising the DCIA for presuming to say in his statement to the workforce that the tapes were not relevant to any SSCI investigations. He followed this by asking if the tapes were destroyed for reasons of legality or public opinion and said the episode was yet another reason why the entire SSCI must be briefed on sensitive CIA programs in advance.[167]

~~(TS/~~[redacted]~~/NF)~~ The Director then briefed the Committee on the history of the tapes, including why they were created, their review by OGC and the IG, and when and why they were destroyed. His talking points for the briefing included mention that OGC reviewed the Abu Zubaydah tapes and found that the cable traffic accurately described the interrogation methods employed and that these methods conformed to the applicable legal and policy standards. The talking points also noted, however, that the OIG reviewed the same tapes and found that the waterboard technique was different from the technique in the DoJ opinion approving its use. The OIG's review recommended that CIA revisit the waterboard technique with DoJ to ensure it understood how it was applied and to obtain a new legal opinion, which it did. In the question and answer period that followed, the Director noted that then Chairman Roberts, [redacted] and [redacted] attended the briefing at which Agency leaders informed them of the existence of the interrogation tapes and of their intention to destroy the tapes. Director Hayden stated that Agency records indicated that [redacted] committed to informing then Vice Chairman Rockefeller about the matter.[168]

~~(TS/~~[redacted]~~/NF)~~ More than 40 questions and comments were asked and made by Committee members in the 75-minute meeting. Senator Rockefeller began by saying it was his "strong desire" for the SSCI to have every email, every cable, every legal opinion, and all other material the Director referenced in his remarks. Rockefeller then asked if, during the 16 November 2006 hearing, the DCIA and [redacted] had known about the tapes and their destruction when they were asked about videotaping detainees. The Director replied that he had been only generally aware of them, and that in any event he and [redacted] had been talking about the future of the program, not its past. Senator Whitehouse asked if there were any plans to discipline those involved in the destruction of the tapes (answer: DoJ and OIG were reviewing the matter). The Senator then asked if the leaked photos from Abu Ghraib had started the effort to destroy the tapes. (No, the effort had started before.) Senator Bayh suggested that the tapes contained embarrassing information, which, even if not unlawful, could make the NCS look bad, and that's why they were destroyed.[169]

~~(TS/~~[redacted]~~/NF)~~ In response to a question from Senator Whitehouse about the difference between the written summary of the tapes and the tapes themselves, the DCIA said, "These operational cables are something that we do not normally volunteer, certainly, share with the Committee. We have already decided in this case that that would be something. And the logic goes something like this. One of the reasons that we said we could destroy the tapes was that you all hadn't asked for them. That implies if you all had asked for them we would have given them to you. The tapes don't exist. We think these are a more than adequate representation of the tapes and therefore, if you want them, we'll give you access to them."[170] The Committee followed up by requesting a lengthy list of documents in a letter to Director

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Hayden dated 19 December 2007. At the top of the list was "all operational cables describing the videotaped interrogation sessions."[171]

(~~TS/~~[redacted]~~/NF~~) The reception the Director received the next day, 12 December, at a HPSCI briefing was, if anything, even more contentious than the SSCI briefing had been a day earlier. The meeting lasted more than three hours and members asked questions or commented more than 100 times. Chairman Reyes opened the briefing by stating he was very troubled by the destruction of the tapes and that the Committee would conduct a full investigation. Ranking minority member Hoekstra then again complained that as Chairman of HPSCI in 2005, he had never been informed about the existence or the destruction of the tapes, and he said he was upset that the Director's statement to the workforce on 6 December implied otherwise. Several other members also took issue with the Director's statement, saying it put HPSCI members on the spot. A comment by Congressman Rogers seemed to sum up the attitude of most members: "This entire episode does not add up, too many inconsistencies, the Committee was misled, and it's impossible for HPSCI members to defend the CIA if HPSCI is not getting the truth." The Director once again had to point out that his comments about videotaping in an earlier session had been directed at the future of the program, not its past.[172]

(~~TS/~~[redacted]~~NF~~) At a follow-on hearing on 16 January 2008 to hear testimony from Acting General Counsel John Rizzo, Ranking Member Hoekstra, in his opening statement, said that the documents the Committee had reviewed to date portray CIA as out of control and not accountable to elected and appointed officials. Soon thereafter, Representative Tierney asked the Chairman to have all Agency officers in the room identify themselves by name and position. After that was done, Tierney introduced a motion to have all Agency officers except Rizzo removed from the room; it passed with bipartisan support. After the session, during which Rizzo was grilled about the destruction of the tapes, Representative Ruppersberger said he had never seen anything like Tierney's motion before, and that he was surprised to see the two parties unite as they did to clear the room, "expressing some amazement at the bipartisan nature of the opposition to CIA."[173]

(~~C~~) Once this round of hearings on the destruction of tapes had been completed, a lull in briefings ensued as the oversight committees turned their focus on the acquisition and exploitation of documents in support of the investigations they had launched into the tapes affair. Director Hayden briefly mentioned the RDI program in his public Annual Threat Assessment testimony before the SSCI on 4 February 2008. In it, he said that "in the life of the CIA detention program we've detained fewer than a hundred people. Of the people detained, fewer than a third have had any of what we call the enhanced interrogaton techniques used against them. Let me make it very clear and to state so officially in front of this Committee that waterboarding has been used on only three detainees. It was used on Khalid Sheikh Mohammed, it was used on Abu Zubaydah, and it was used on Nashiri. The CIA has not used waterboarding for almost five years. We used it against these three high-value detainees because of the circumstances of the time. Very critical to those circumstances was the belief that additional catastrophic attacks against the home were imminent. In addition to that, my Agency and our Community writ large had limited knowledge about al-Qa'ida and its workings."[174]

(~~TS/~~[redacted]~~/NF~~) OCA records indicate that there were no further briefings or hearings on the program until the SSCI met on 10 June 2008 to hear testimony on the DoJ opinions legalizing the RDI effort. [redacted] CTC Legal [redacted] attended for the Agency and Steven Bradbury for DoJ. Senators Rockefeller, Feinstein, Feingold, Nelson, Wyden, Snowe, and Whitehouse all made comments that were highly critical of the program and the OLC opinions that supported it. Senator Rockefeller began the session by saying that he was upset that congressional intent in opposing CIA's interrogation program was not factored into OLC opinions on the program. Even though Congress did not enact into law any prohibitions against the program, he said congressional intent was clearly opposed. He asked, "Is it irrelevant that majorities in both houses of Congress oppose CIA techniques?"[175]

(~~TS/~~[redacted]~~/NF~~) Members turned to [redacted] for factual information about the interrogation techniques and CIA's interactions with OLC. Senator Rockefeller asked [redacted] to describe sleep deprivation techniques, noting that the public would be revolted by the techniques. [redacted] explained the techniques and discussed the limits on the duration of the deprivation and procedures for asking permission to extend the period of deprivation. Senator Bond asked [redacted] if any detainees had suffered lasting effects from the EITs, and [redacted] replied that none had. Senator Snowe asked how it was determined to use techniques outside of those allowed in the Army Field Manual, and [redacted] responded that CIA first uses non-coercive techniques to elicit information and that out of a total of 98 detainees only 30 have undergone enhanced interrogation techniques. Senator Rockefeller asked if the Agency had ever had an independent analysis done of its interrogation techniques, to which [redacted] replied that the sensitivity of the program prevented the use of an outside organization to do such an analysis. Senator Feingold asked [redacted] for a copy of the psychological assessment of HVD Rahim, and Senator Feinstein asked about the credentials of the psychologists involved in the interrogations. [redacted] said he would take those questions back to Headquarters.[176]

Tension over Access to Documents Mounts

(~~TS/~~[redacted]~~/NF~~) It was not long before the oversight committees began to express disappointment with the Agency's responsiveness to their document requests on the destruction of the tapes. On 5 February 2008, HPSCI staffers [redacted] and [redacted] visited Headquarters to view a summary of operations cables describing the interrogations of Abu Zubaydah and al-Nashiri. The OCA summary of the visit, prepared by [redacted] reflects the growing unhappiness: '[redacted] indicated to me right off that he was insulted that we believed the document would be sufficient or 'anywhere near sufficient' to answer HPSCI concerns and that we had wasted his and [redacted] time by forcing them to come out to our building to read two pages. He also challenged the premise that the sensitivity of the information dictated it could not be sent to committee spaces.... He then highlighted that HPSCI's requests for information were over 60 days old and accused me personally and the CIA of slow-rolling the HPSCI's investigation and withholding relevant documents from the committee." In particular [redacted] stated HPSCI should be allowed to see any document that would cast light on potential motives for the destruction of the tapes, such as the operational cables describing the interrogations.[177]

(~~TS/~~[redacted]~~/NF~~) Similarly, SSCI staffers focused on the operations cables, access to which they believed Director Hayden had promised the Committee. On a 6 February 2008 visit to Headquarters, SSCI staff member [redacted] pushed for access to the cables and the raw intelligence from

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[redacted] claiming they were central to the SSCI's investigation because the Committee would be unable to assess the appropriateness of their destruction without knowing what was on the tapes. Like [redacted] ejected any summary of the cables as inadequate for the Committee's needs.[178]

(~~TS/~~[redacted]~~/NF~~) Senators Rockefeller and Bond wrote to Director Hayden in April to complain about the Agency's lack of responsiveness. "Although we have received some documents from the CIA, there are a number of documents that we still have not received. In particular, although we requested the daily operational cables describing the videotaped interrogation sessions in our letter of December 14, 2007, [sic] those have not yet been provided. Instead, Agency personnel have expressed reluctance to provide these operational cables to the Committee." The Senators reminded the Director of the commitment he made to provide those cables in his briefing to the Committee on 11 December 2007. The Senators then went on to complain that "Many of the documents that were provided to the Committee redact information relevant to understanding what was portrayed on the tapes, who was involved in the deliberation about the tapes, the purpose of videotaping and destroying the tapes, and the impact of the destruction of the tapes."[179]

(U) Chairman Rockefeller wrote again to Director Hayden on 29 October 2008 to strongly criticize the Agency for its lack of responsiveness to questions for record from the 10 June hearing on OLC opinions and to earlier questions posed by the Committee. The letter is worth quoting at length because it exemplifies the strains that had developed between the Agency and the oversight committees by the end of 2008:

(U) *On September 8, 2008, the Committee sent you questions for the record from that June 10, 2008 hearing, incorporating questions submitted by five Committee members. The September 8th letter also requested CIA documents that formed the factual basis for OLC's legal opinions. Those documents had previously been requested in May 2007, in questions submitted to the CIA after an April 12, 2007 hearing on the interrogation program. The documents were again requested in a June 5, 2008 letter from the Committee.... Despite numerous verbal requests from Committee staff, these documents still have not been provided to the Committee.*

On October 21, 2008, the Committee received a letter from the CIA's Director of the Office of Congressional Affairs, dated October 17, 2008, in response to the Committee's September 8, 2008 letter. Rather than responding to the questions that the Committee had submitted for response or providing any of the documents requested, the Office of Congressional Affairs essentially refused to provide the information requested by the Committee.

The letter stated that the CIA had kept the Committee informed about the detention and interrogation program from its inception, that you had personally appeared before the Committee to brief the program, and that the CIA had already provided documents on the program....

The CIA's refusal to respond to hearing questions for the record is unprecedented and is simply unacceptable. The CIA's year and a half delay in providing the documents requested by the Committee in May 2007 shows blatant disregard for congressional oversight of the CIA's detention and interrogation program....

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> *Moreover, the suggestion included in the letter by your Director of the Office of Congressional Affairs that this program has been briefed to the Committee's satisfaction throughout the program's history is inconsistent with the facts. The CIA witness was unable to provide details about the program on a number of issues at the June 10, 2008 hearing, and five Members of the Committee had additional questions that were not answered at the hearing. Despite multiple requests from the Committee, you have not personally appeared to testify at a Committee hearing concerning the operation of the CIA's interrogation and detention [program] since April 12, 2007. Furthermore, the Committee through the staff has repeatedly sought access to a variety of information and documents—including CIA's assessments of the efficacy of the interrogation techniques used in the program—without success. Finally, despite the significant interest of the full Committee in having access to all aspects of the program, the full Committee was not briefed on the interrogation components of the program until September 6, 2006, more than four years after the program's inception and the same day that the Administration chose to publicly disclose the existence of CIA's interrogation and detention program.*
>
> *The Committee has an important role in overseeing the activities of the CIA, most of which are kept out of the public view and cannot be subject to full debate: As you have pointed out, this oversight role is also critical to public trust in the CIA. When CIA is not responsive to the Committee's requests for information or refuses to provide complete information, such actions undermine congressional, and ultimately public, trust in the CIA's activities.*[180]

(U) That same day, 29 October 2008, Chairman Rockefeller and Vice Chairman Bond wrote to Director Hayden to remind him of another request for documentation that had gone unanswered. "Although the Senate Select Committee on Intelligence has repeatedly requested documents concerning consultation and discussion about CIA's detention and interrogation program, the CIA has never provided the Committee with written policy approval from the White House or the National Security Council for the CIA's program."[181]

(U) The following day, Senator Feinstein also sent a short, but pointed, letter of complaint to the DCIA. "On September 18, 2008, I wrote to you with a number of specific questions about the CIA detention and interrogation program. I want you to know that I found the October 17, 2008 reply, from Christopher J. Walker to me, appalling. I will certainly have more to say about this next year."[182] Feinstein's letter of 18 September had contained a lengthy list of questions about what steps were taken to hold individuals accountable for abuses in the program.[183]

~~(S//NF)~~ OCA's response sought to assure the Senator that all of the cases she cited in her letter had been or were being investigated by the OIG, but it gave no specific responses to her questions. Instead, it used language that was very similar to that which had annoyed Senator Rockefeller in his lengthy letter to the Director on 29 October, quoted above: "As you know, CIA has kept the Senate Select Committee on Intelligence (SSCI) informed about the RDI program from its inception, first through briefings to the leadership and staff directors and later the full committee and almost all staff. The DCIA has personally appeared before the Committee regarding the program multiple times, and Committee Members and staff have been briefed by CIA counterterrorism experts, Office of General Counsel attorneys, Office of Inspector General personnel who have investigated the program, and contractors involved in the program. CIA has responded to numerous written requests for information from SSCI on this topic. Over the

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course of the past six years, CIA has provided 16 written notifications and responded in writing to more than 100 written questions from the SSCI regarding the details and legality of each interrogation technique authorized in the CIA program."[184]

(U) OCA records indicate that there were no additional hearings with the oversight committees on RDI in 2008.

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End Notes

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[1] "CIA Rendition and Detainee Program," 14 March 2007, ~~(TS/~~[redacted]~~/NF/~~[redacted], DCI Job 10M01815R, box 9, folder 260. Rendition is defined as the involuntary transport of a person from one country to another outside of an extradition or immigration removal/deportation process.

[2] George W. Bush, *Decision Point* (New York: Crown Publishers, 2010), p. 139.

[3] Ibid., p. 154.

[4] Andrew Greeley, "We're no safe now than we were Sept. 10," *Chicago Sun Times*, 22 March 2002; Melinda Henneberger, "U.S. Issues Warning on Possible Easter Attack for 4 Italian Cities," *New York Times*, 28 March 2002; p. A7; Thomas Friedman, "No Mere Terrorist," *New York Times*, 24 March 2002; Peter Ford, "Legal war on terror lacks weapons," *Christian Science Monitor*, 27 March 2002, p. 8.

[5] Bush, p. 168.

[6] Ibid.

[7] George Tenet with Bill Harlow, *At the Center of the Storm: My Years at the CIA* (New York: HarperCollins, 2007), p. 145.

[8] Ibid., p. 240

[9] "Getting Abu Zubaydah to Talk," 29 March 2002, 1630 Hours ~~(TS~~[redacted]~~NF)~~, History Staff Job 09-02619R, box 1, folder 4.

[10] Ibid.

[11] [redacted] "Recognizing and Developing Countermeasures to Al Qaeda Resistance to Interrogation Techniques: A Resistance Training Perspective," undated ~~(S/NF~~[redacted]), CIA Automatic Declassification and Release Environment (CADRE) doc. no. C05330588.

[12] Lotus Note from [redacted] OGC, "Gang of 8 (15) Notification Guidelines," 16 October, 2001 ~~(TS)~~; memo from [redacted] to DCI Tenet, "Expanding Congressional Notification of [redacted] 1 November 2001 ~~(TS/~~[redacted]), OCA files.

[13] D/CIA Briefing for House Appropriations Committee, 8 November 2005 ~~(TS/~~[redacted], DCI Job 09M00111R, box 4, folder 97.

[14] Note from [redacted] to [redacted] and [redacted] 'Sensitive Matters for the SSCI Quarterly [redacted] Briefing," 19 November 2002, History Staff files.

[15] Memorandum for the Record from [redacted] C/CTC [redacted] [redacted] Meeting on Detainees," 6 April 2006 ~~(TS/~~[redacted]~~/NF)~~, History Staff files.

[16] OCA Memorandum for the Record C/2003-00086, 4 February 2003 ~~(TS/~~[redacted]), OCA files.

[17] CSI Interview with [redacted] 13 October 2006 ~~(TS/~~[redacted]~~/NF)~~, History Staff files.

[18] Stanley Moskowitz, "CIA-led Terrorist Renditions Since 11 September 2001," background paper sent to various members of Congress and congressional staffers, 11 March 2002 ~~(TS/~~[redacted]~~/NF)~~.

[19] Jose A. Rodriguez, Jr. with Bill Harlow, *Hard Measures: How Aggressive CIA Actions After 9/11 Saved Lives* (New York: Threshold Editions, 2012), p. 53.

[20] Ibid.

[21] Tenet, p. 241.

[22] OCA Memoranda for the Record C/2002-00469 and C/2002-00468, both dated 10 April 2002, OCA files. The CTC briefers were [redacted] and Philip Mudd.

[23] Memo from Stanley Moskowitz, "Interrogators Making Slow Progress with Abu Zubaydah," 30 May 2002, OCA files.

[24] Bush, p. 168.

[25] Rodriguez, p. 57.

[26] [redacted] interview.

[27] OCA Memorandum for the Record C/2007-170, 15 November 2007 ~~(TS~~[redacted], OCA Job 10M02127R, box 1, folder 53.

[28] CIA Inspector General, "Special Review: Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)," 7 May 2004, p 9. ~~(TS/~~[redacted]~~NF)~~.

[29] Ibid., p. 10.

[30] [redacted] interview.

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[31] Rodriguez, p. 61.

[32] "Special Review," p. 13.

[33] Ibid., p. 14.

[34] These are summarized in ibid., p. 15.

[35] [redacted] "Selected Chronology on Detentions and Interrogations," undated ~~(TS/~~[redacted]~~/NF)~~, DCI Job 10M00239R, box 2, folder 79. See also Director 237247, 3 May 2002 ~~(TS)~~, DCI Job 10M00239R, box 2, folder 79.

[36] Ibid.

[37] Ibid.

[38] Bush, p. 169. Bush also writes that "There were two that I felt went too far, even if they were legal. I directed the CIA not to use them." It is possible that one of these techniques was the mock burial originally proposed by [redacted] but it is not clear what the other technique might have been.

[39] CTC, "Counterterrorist Detention and Interrogation Program, Tab D, Spreadsheet of Types of Interrogation Techniques Used," 1 March 2005 ~~(TS/~~[redacted]~~NF)~~, DCI Job 10 10M00239R, box 2, folder 80.

[40] Unsigned Memo, "Successes of CIA's Counterterrorism Detention and Interrogation Activities," 24 February 2004 ~~(TS/~~[redacted]~~NF)~~, DCI Job 05M00180R, box 7, folder 148.

[41] OCA Memorandum for the Record C/2002-01000, 7 August 2002 ~~(TS/~~[redacted]~~NF)~~, OCA Records.

[42] Alec [redacted] ~~TS)~~, DCI Job 10M00239R, box 2, folder 79.

[43] Director [redacted] ~~(TS)~~, DCI Job 10 10M00239R, box 2, folder 79.

[44] Memo from Director, DCI Counterterrorist Center to Director of Central Intelligence, "Disposition of Videotapes," 20 December 2002 ~~(S)~~, OCA Job 10M00641R, box 3, folder 45.

[45] Congressional Notification, "Key al-Qa'ida Operative al-Nashiri in Custody," 20 November 2002 ~~(TS/~~[redacted]~~NF)~~, OCA files. See also "Spreadsheet of Types of Interrogation Techniques Used" cited above.

[46] "EITs Used With CIA Detainees," 8 January 2007 ~~(TS/~~[redacted]~~NF)~~, OCA Job 11M00126R, box 1, folder 7.

[47] Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities," *Washington Post*, 26 December 2002, p. A1.

[48] Memorandum for Director of Central Intelligence from Inspector General John Helgerson, "Particularly Serious Problems," 23 January 2003 ~~(TS//FOUO)~~, DCI Records, Job 04K01853R, box 8, folder 129.

[49] [redacted] "Selected Chronology."

[50] OCA Memorandum for the Record C/2003-00086, 4 February 2003 ~~(TS~~[redacted], DCI Records, Job 05M00180R, box 7, folder 146.

[51] Ibid.

[52] Ibid.

[53] Ibid.

[54] Ibid.

[55] OCA Memorandum for the Record C/2003-00086, 4 February 2003 ~~(TS/~~[redacted], OCA files.

[56] OCA Memorandum for the Record C/2003-00087, 5 February 2003 (classification not given), OCA Job 10M02127R, box 1, folder 51.

[57] The use of diapers was not considered an enhanced interrogation technique. [redacted] may have misspoken on this occasion.

[58] OCA Memorandum for the Record C/2003-00087, 5 February 2003 (classification not given), OCA Job 10M02127R, box 1, folder 51.

[59] Letter from Representative Jane Harman to General Counsel Scott Muller, 10 February 2003 ~~(TS)~~, CADRE doc. no. C05588631.

[60] Ibid.

[61] Letter from General Counsel Scott Muller to Representative Jane Harman, 28 February 2003 ~~(TS)~~, CADRE doc. no. C05588631.

[62] Ibid.

[63] Scott Muller, Memorandum for the Record, "'Humane' Treatment of CIA Detainees, 12 February 2003, ~~(TS~~[redacted]~~/NF)~~, CADRE doc. no. C05615548.

[64] [redacted] "Selected Chronology."

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[65] Ibid.

[66] Scott Muller, Memorandum for the Record, "Review of the Interrogation Program on 29 July 2003," 5 August 2003 ~~(TS~~[redacted]~~NF)~~, DCI Records, Job 10M000239R, box 1, folder 29.

[67] Ibid.

[68] Ibid.

[69] Scott Muller, Memorandum for the Record, "The House Permanent Select Committee on Intelligence Briefing," 3 March 2004 ~~(TS~~[redacted]~~NF)~~, DCI Job 05M00180R, box 7, folder 146.

[70] Ibid.

[71] "Special Review," p. 48.

[72] Ibid., p. 68.

[73] Ibid., p. 55.

[74] Ibid., p. 53.

[75] [redacted]51671,[redacted] ~~(S)~~.

[76] Ibid.

[77] Ibid.

[78] David Johnston and Neil Lewis, "U.S. Examines Role of CIA and Employees in Iraq Deaths," *New York Times*, 6 May 2004, p. A13.

[79] The death at Abu Ghraib was that of Manadal al-Jamaidi, a former Iraqi military officer who died while being questioned by CIA officers on 4 November 2003. A Congressional Notification about the death was issued on 28 January 2004.

[80] [redacted]

[81] Note from [redacted] CTC/Legal [redacted]o various recipients, "Videotapes not be destroyed," 11 May 2004 ~~(TS)~~, CADRE doc. no. C05588631.

[82] See, for example, Laura Sullivan, "Some in FBI balked at CIA ties," *Baltimore Sun*, 25 May 2004.

[83] Dana Priest and R. Jeffrey Smith, "Memo Offered Justification for Use of Torture," *Washington Post*, 8 June 2004, p. A1.

[84] Dana Priest, "CIA Puts Harsh Tactics on Hold," *Washington Post*, 27 June 2004, p. A1.

[85] John Moseman, Memorandum for the Record, "[redacted]Weekly Meeting," 23 June 2004 ~~(TS)~~, DCI Records, Job 06K002294R, box 3, folder 5.

[86] Ibid.

[87] "Briefing for [redacted] CIA Renditions, Detention, and Interrogation Programs," 2 May 2006 ~~(TS~~[redacted]~~NF)~~, History Staff files.

[88] "EITs Used With CIA Detainees," 8 January 2007 ~~(TS/~~[redacted]~~NF)~~, OCA Job 11M00126R, box 1, folder 7.

[89] John Helgerson, Memorandum for the Record, "IG Meeting with SSCI Chairman and Vice Chairman," 24 November 2003 ~~(S)~~, History Staff files.

[90] OCA Memorandum for the Record, C/2004-00730, 13 July 2004, ~~(TS~~[redacted]~~/NF)~~, OCA Job 10M02127R, box 1, folder 70.

[91] Ibid.

[92] Ibid.

[93] Ibid.

[94] Ibid.

[95] Ibid.

[96] Ibid.

[97] Memorandum for the Record, 15 July 2004, CADRE doc. no. C05515386.

[98] Note from John Helgerson to DCI/OIG/Interrogations, "Discussions on the Hill," 16 July 2004 ~~(TS~~[redacted]~~/NF)~~, CADRE doc. no. C05515670

[99] Note from John Helgerson to Patrick Murray, "IG Briefings of SSCI & VP)," 11 March 2005 ~~(U/AIOU)~~, CADRE doc. no. C05515669.

[100] Letter from Senator John D. Rockefeller IV to DCI Porter Goss, 8 September 2005 (U); letter from D/OCA Joe Wippl to Senator John D. Rockefeller, 23 May 2005, OCA files. To date, no response from Goss has been found in CIA records. (U)

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[101] Dana Priest, "Democrats Seek Probes on CIA," *Washington Post*, 2 March 2005, p. A7.

[102] David Morgan, Reuters, "Senate Intelligence Chief Denies CIA Tortured," *Boston Globe.com*, 10 March 2005.

[103] Dana Priest, "Senate Urged to Probe CIA Practices," *Washington Post*, 22 April 2005, p. A2.

[104] Alexander Bolton, "Frist, Reid Intervene in Intel row," *The Hill*, 10 May 2005.

[105] OCA Memorandum for the Record, 4 April 2005, C/2005-00277 ~~(TS)~~, CADRE doc. no. C05527221.

[106] "Congressional Committee Briefing: CIA Rendition, Detention, and Interrogation Programs," February 2005 ~~(TS/~~[redacted]~~/NF)~~, DCI Job 10M00239R, box 3, folder 92.

[107] Ibid.

[108] Jeffrey H. Smith, "Central Torture Agency?," *Washington Post*, 9 November 2005, p. A31.

[109] "Fully Briefed Regarding Interrogation Techniques," CADRE doc. no. C05515386. Records about these briefings have not been located.

[110] [redacted] Memorandum for the Record, "Briefing for HPSCI Chairman Hoekstra, 8 November 2005," ~~(TS/~~[redacted]~~/NF/~~[redacted]), OCA Job 10M02127R, box 1, folder 53.

[111] Congressional Notification, "Suspending Use of Interrogation Techniques at CIA Detention Facilities," undated ~~(TS/~~[redacted], DCI Job 10M00239R, box 2, folder 79.

[112] OCA Memorandum for the Record, 15 March 2006, C/2006-00286, ~~(TS~~[redacted]~~/NF)~~ OCA Job 10M02127R, box 1, folder 53.

[113] Ibid.

[114] [redacted]

[115] Ibid.

[116] [redacted] Talking Points, "Update on High-Value Detainee Endgame: [redacted] Joint Plan for Approach to [redacted]" 26 May 2005, ~~(TS~~[redacted]~~NF)~~, DCIA Job 10M00239R, box 2, folder 72.

[117] [redacted]

[118] [redacted] "Detainee Endgame," 28 October 2005, ~~(TS~~[redacted]~~NF)~~, DCIA Job 10M00239R, box 2, folder 81.

[119] OCA Memorandum for the Record, 7 June 2006, C/2006-00627, ~~(TS~~[redacted]~~NF)~~, CADRE doc. no. C05520876.

[120] OCA Memorandum for the Record, 8 June 2006, C/2006-00633, ~~(TS~~[redacted]~~NF)~~, CADRE doc. no. C05520877.

[121] Bush, p. 178.

[122] OCA Memorandum for the Record, 11 July 2006, C/2006-00718, ~~(TS~~[redacted]~~NF)~~, OCA Job 11M00126R, box 2, folder 130.

[123] Ibid.

[124] Ibid.

[125] Bush, p. 178.

[126] OCA Memorandum for the Record, 6 September 2006, C/2006-00932, ~~(TS~~[redacted]~~NF)~~, located in History Staff files.

[127] OCA Memorandum for the Record, 6 September 2006, C/2006-00968, ~~(TS~~[redacted]~~NF)~~, located in History Staff files.

[128] OCA Memorandum for the Record, 6 September 2006, C/2006-00910, ~~(TS~~[redacted]~~NF)~~, located in History Staff files.

[129] OCA Memorandum for the Record, 6 September 2006, C/2006-00499, ~~(TS~~[redacted]~~NF)~~, located in History Staff files.

[130] Note from [redacted] to [redacted] Briefing for Senator John S. McCain (R-AZ), 11 September 2006, ~~(TS/~~[redacted]~~NF)~~, OCA Job 11M00126R, box 2, folder 139.

[131] OCA Memorandum for the Record, 16 November 2006, C/2006-01100, ~~(TS/~~[redacted]~~/NF)~~, CADRE doc. no. C05520880.

[132] Ibid.

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[133] Transcript excerpts, SSCI Briefing on the CIA's Interrogation and Rendition Program, 16 November 2006, ~~(S-NF)~~, CADRE doc. no. C05588628.
[134] Ibid.
[135] OCA Memorandum for the Record, 16 November 2006, C/2006-01198, ~~(TS~~[redacted]~~NF)~~, CADRE doc. no. C05520958; note from [redacted] OCA, to [redacted] C/CTC, Videotaping an Issue w/oversight as early as 2003, 3 December 2007, ~~(TS/~~[redacted]~~/NF)~~, CADRE doc. no. C05595519.
[136] OCA Memorandum for the Record, 19 December 2006, C/2006-01201, ~~(TS/~~[redacted]~~NF)~~, CADRE doc. no. C05515437.
[137] DCIA Testimony on Destruction of Abu Zubaydah Videotapes, undated, ~~(TS~~[redacted]~~/NF)~~, CADRE doc. no. C05588612.
[138] OCA Memorandum for the Record, 14 March 2007, C/2007-00290, ~~(TS~~[redacted]~~NF)~~, OCA Job 10M02172R, box 1, folder 57.
[139] Ibid.
[140] "Why CIA Does Not Videotape Interrogation Sessions," 19 March 2007, ~~(TS~~[redacted]~~/NF)~~, available in History Staff files.
[141] DCIA Testimony on Destruction of Abu Zubaydah Videotapes, undated, ~~(TS/~~[redacted]~~NF)~~, CADRE doc. no. C05588612.
[142] Ibid.
[143] OCA Memorandum for the Record, 15 November 2007, C/2007-170, ~~(TS/~~[redacted]~~/NF)~~, OCA Job 10M02127R, box 1, folder 53.
[144] OCA Memorandum for the Record, 14 February 2007, C/2007-00182, ~~(TS~~[redacted]~~NF)~~, OCA Job 10M02127, box 1, folder 56.
[145] DCIA Classified Statement for the Record, Senate Select Committee on Intelligence, 14 February 2007, ~~(TS/~~[redacted]~~/NF)~~, DCIA Job 10M02167R, box 4, folder 5.
[146] "Senators say U.S. should examine detainee treatment," Reuters, 16 March 2007.
[147] Anne Applebaum, "Tortured Credibility," *Washington Post*, 20 March 2007, p. A19.
[148] Ibid.
[149] "The President's Prison," *New York Times*, 25 March 2007, p. WK11.
[150] OCA Memorandum for the Record, 12 April 2007, C/2007-00409, ~~(TS~~[redacted]~~NF)~~, OCA Job 11M00126R, box 1, folder 32.
[151] Letter from Senator Russell D. Feingold to Director Michael Hayden, 1 May 2007, ~~(TS/~~[redacted]~~/NF)~~, CADRE doc. no. C05492384.
[152] Letter from Senators Dianne Feinstein, Ron Wyden, and Chuck Hagel to Director Michael Hayden, 11 May 2007, ~~(TS~~[redacted]~~/NF)~~, OCA Job 11M00126R, box 1, folder 32.
[153] [redacted] Classified Statement for the Record, Senate Select Committee on Intelligence, 2 August 2007, ~~(TS/~~[redacted]~~NF)~~, DCIA Job 10M01148R, box 4, folder 73.
[154] OCA Memorandum for the Record, 24 July 2007, C/2007-00787, ~~(TS/~~[redacted]~~NF)~~, OCA Job 11M00126R, box 2, folder 134.
[155] Ibid.
[156] Ibid.
[157] OCA Memorandum for the Record, 2 August 2007, C/2007-00814, ~~(TS/~~[redacted]~~NF)~~, CADRE doc. no. C05515440.
[158] [redacted] Classified Statement for the Record, Senate Select Committee on Intelligence, 2 August 2007, ~~(TS/~~[redacted]~~/NF)~~, DCIA Job 10M01148R, box 4, folder 73.
[159] Ibid.
[160] OCA Memorandum for the Record, 2 August 2007, C/2007-00814, ~~(TS/~~[redacted]~~/NF)~~, CADRE doc. no. C05515440.
[161] Mark Mazzetti, "C.I.A. Destroyed 2 Tapes Showing Interrogations," *New York Times*, 7 December 2007, p. A1.
[162] OCA Memorandum for the Record, 4 December 2007, C/2008-112, ~~(TS)~~, CADRE doc. no. C05690716.
[163] Message from the Director, "Taping of Early Detainee Interrogations," 6 December 2007. (U). Available in History Staff files.

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[164] Letter from HPSCI Chairman Reyes and Ranking Member Hoekstra to DCIA Hayden, 7 December 2007, (U), CADRE doc. no. C01524156.
[165] Letter from HPSCI Rankin Member Hoekstra to DCIA Hayden, 10 December 2007, (U), CADRE doc. no. C05654005.
[166] Letter from SSCI Chairman Rockefeller and Vice Chairman Bond to DCIA Hayden, 10 December 2007, ~~(TS/~~[redacted]~~/NF)~~, CADRE doc. no. C05654005.
[167] OCA Memorandum for the Record, 11 December 2007, C/2007-269, ~~(TS/~~[redacted]~~/NF)~~, History Staff files.
[168] Collection of notes and talking points prepared for DCIA testimony to SSCI on 11 December 2007, ~~(TS~~[redacted]~~NF)~~, CADRE doc. no. C05588613.
[169] Ibid.
[170] Quoted in a letter from SSCI Chairman Rockefeller and Vice Chairman Bond, 21 April 2008, ~~(TS~~[redacted]~~NF)~~, DCIA Job 11M1343R, box 8, folder 10.
[171] Letter from SSCI Chairman Rockefeller and Vice Chairman Bond to DCIA Hayden, 19 December 2007, ~~(TS/~~[redacted]~~/NF)~~, DCIA Job 10M01148R, box 3, folder 10.
[172] OCA Memorandum for the Record, 12 December 2007, C/2007-270, ~~(TS~~[redacted]~~NF)~~, History Staff files.
[173] OCA Memorandum for the Record, 16 January 2008, C/2008-48, ~~(TS~~[redacted]~~NF)~~, History Staff files.
[174] Director 267647, "DCIA Excerpts from 4 February SSCI Testimony," 7 February 2008, ~~(C)~~ CADRE doc. no. C05530812.
[175] OCA Memorandum for the Record, C/2008-738, 10 June 20087, ~~(TS~~[redacted]~~NF)~~, CADRE doc. no. C05515442.
[176] Ibid.
[177] OCA Memorandum for the Record, C/2008-110, 5 February 2008, ~~(TS~~[redacted]~~/NF)~~, History Staff files.
[178] OCA Memorandum for the Record, C/2008-114, 6 February 2008, ~~(TS/~~[redacted]~~/NF)~~, History Staff files.
[179] Letter from SSCI Chairman Rockefeller and Vice Chairman Bond, 21 April 2008, ~~(TS~~[redacted]~~NF)~~, DCIA Job 11M1343R, box 8, folder 10.
[180] Letter from SSCI Chairman Rockefeller to DCIA Hayden, 29 October 2008, (U), History Staff files.
[181] Letter from SSCI Chairman Rockefeller and Vice Chairman Bond to DCIA Hayden, 29 October 2008, (U), History Staff files.
[182] Letter from Senator Feinstein to DCIA Hayden, 30 October 2008, (U), History Staff files.
[183] Letter from Senator Feinstein to DCIA Hayden, 18 September 2008, ~~(TS~~[redacted]~~NF)~~, History Staff files.
[184] Letter from Christopher Walker to Senator Feinstein, 17 October 2008, ~~(S//NF)~~, History Staff files.

13 March 2007

CIA Rendition, Detention and Interrogation Program Overview

KEY BACKGROUND:

The rendition, detention, and interrogation program removes terrorists from the battlefield and collects threat and actionable intelligence in a manner that does not violate any US statute, the US Constitution, or US treaty obligations. CIA has determined only to take **detainees into CIA detention if they are assessed to have knowledge of imminent threats to the Homeland or U.S. interests abroad -OR- locational information on al-Qa'ida's #1 and/or #2.** While in debriefings, detainees also generally provide strategic and tactical intelligence on al-Qa'ida networks, plans, and infrastructure, to include location data on other High-Value Targets and al-Qa'ida operatives at large.

LEGAL

The authorities for our rendition, detention and interrogation programs are the 1986 Presidential Finding and the 17 September 2001 Presidential Memorandum of Notification (MON).

- Under the 17 September 2001 Presidential MON, the DCI directed CTC in mid-2002 to establish a program to capture, detain, and interrogate the highest-value al-Qa'ida operatives to obtain critical threat and actionable intelligence.

- The Agency has sought and obtained Department of Justice legal review and determination that CIA's Enhanced Interrogation Techniques (EIT's), whether used singularly or in some combination, do not violate the federal torture statute in Sections 2340 and 2340A of title 18 of the United States Code, nor would they violate U.S. obligations under Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibiting the cruel, inhuman or degrading treatment, defined for purposes of U.S. law as cruel, unusual, or inhumane as prohibited by the Fifth, Eighth and Fourteenth Amendments.

- CIA also received a determination from DOJ that CIA's conditions of confinement do not violate the provisions of the Detainee Treatment Act and do not violate Common Article 3 of the Geneva Convention.

- DOJ is currently drafting new opinions that will consider the seven EITs proposed for future use by CIA against the Detainee Treatment Act, the Military Commissions Act of October 2006, and Common Article 3 of the Geneva Conventions.

RENDITIONS

[redacted] Renditions accomplish two key warfighting goals: they take terrorists off the street and enable us to collect valuable intelligence on planned attacks and on those who remain at large. [redacted]

The 17 September 2001 MON added to the authority of the 1986 Presidential Finding, by giving CIA authority to undertake operations [redacted] designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities. This authority inherently permits CIA to transport a person from the place of capture to the place of detention.

- Approval authority to conduct a rendition has been delegated to D/NCS. The D/NCS uses two criteria in making his decision:
    - The suspect is a member, associate or supporter of a global terrorist group
    - The suspect poses a continuing, serious threat of violence or death to US persons or interests or is planning terrorist activities.

[redacted]

- Since 9/11, [redacted] people have been rendered in operations planned and conducted or facilitated by the CounterTerrorism Center's Rendition and Detainees Group (CTC/RDG). [redacted]

- CIA obtains assurances from the country taking custody of a rendered terrorist suspect that it will not engage in torture and respect his human rights.

- Our rendition program methodology is based on detainee handling procedures used by the US military and US Marshals Service.

DETENTION AND INTERROGATION

[redacted]

- Beginning with the March 2002 capture of Abu Zubaydah, CIA began to develop its own detention and interrogation capability, resulting in CIA building and operating over the succeeding 4 years a number of small overseas detention facilities [redacted]
Our primary goal in all detention and interrogation operations is to obtain threat and actionable intelligence from the detainee in full compliance with the DOJ-approved legal guidelines, all of which are self-imposed - and our intensive system of legal, operational, and management oversight, and medical and psychological review.

- CIA's Enhanced Interrogation Techniques (EIT)s are based on DOD's SERE training methodology, which is used to prepare US servicemen for possible capture, detention, and interrogation in hostile areas, and were all found to be lawful by DOJ before they were used.

- Since establishing CIA's first blacksite in 2002, there have been [redacted] detainees in the program.

  - **Of those held in the program, less than 1/3 [redacted] have undergone EIT's**
  - **Of those [redacted] only 3 have experienced the waterboard (KSM, AZ, and al-Nashiri).**

- **Shortly before passage of the Detainee Treatment Act (DTA), CIA notified the oversight committees that DCIA Goss had suspended the use of EITs pending an evaluation of whether the DTA changes the legal or policy underpinnings for the techniques, or the risk versus gain balance. The Military Commissions Act brought about additional changes. Thus CIA currently has no Enhanced Interrogation Techniques approved for use with a detainee. Prior to being authorized for use, CIA requires a signed Executive Order, required by the MCA, and a new DOJ opinion on each proposed method. The EIT's currently under review are:**

  - Dietary Manipulation
  - Sleep Deprivation
  - Nudity
  - Attention Grasp
  - Facial Hold
  - Facial Slap
  - Adominal Slap

- **DNCS approval is required if an individual is to be brought into CIA's detention program.**
- The DNCS must be advised that the individual:

  - Is believed to possess imminent threat information against the US homeland or US interests abroad and/or
  - Is believed to have locational information on Usama Bin Ladin, and/or Ayman al Zawahiri.

- **DCIA approval is required prior to the use of EITs.**

- Beginning at the point of rendition when we take physical control of a detainee, we undertake a detailed detainee handling process designed to closely monitor and document the detainee's medical and psychological status. If a detainee has been physically abused prior to coming into our custody, we document that fact and pass it on to the IG for investigation.

- In cases in which the detainee being rendered is taken to one of our overseas detention facilities for intelligence exploitation, the detainee is interviewed by the interrogation team; the Site Manager and a team of interrogators immediately begins assessing a detainee's resistance posture. If there are medical or psychological contraindications to interrogation, then the interrogation may not proceed. [redacted]

- Prior to an interrogation team using EIT's, the Site Manager, in coordination with the interrogation team, formulates an interrogation plan, submits the plan to HQS for approval by the DCIA, and approval authority must be transmitted to the Site prior to any methods being used. A detailed interrogation after action report must be submitted at the conclusion of each interrogation session.

SAFEGUARDS AND CONTROLS

From the inception of our detention and interrogation program, we have rigorously self-policed and trained to prevent deviations, improvisation, abuse, and errors by our personnel. We also sought to codify our program within a management structure that promotes safe, secure, and effective detention and interrogation policies and standards. When deviations from established procedures and practices are discovered and reported, immediate corrective action is taken.

The CIA program is structured around a strict system of internal controls, safeguards, and checks and balances to ensure the detention and interrogation program does not violate any US statute, the US Constitution, or US treaty obligations.

The key elements of this system of controls and safeguards are:

- To use the authorized interrogation techniques only when necessary and always in full compliance with guidelines that were reviewed by DOJ and self-imposed required medical and psychological clearances.
- To follow always the "least-coercive measure" principle.
- To screen carefully - through our Office of Medical Services Psychology taff and our Office of Security - all prospective program participants to ensure that all who have contact with detainees are suitable for operating in the high-stress interrogation environment.
- To employ a team concept in all interrogations. This team concept draws together trained and certified interrogators and debriefers **with the**

appropriate checks/balances from medical, psychological, and security personnel in the planning and conduct of all interrogations.

- To provide our interrogators and debriefers the best, most realistic training possible.
- To closely monitor our officers' compliance with all legal and ethical guidelines through detailed daily cable correspondence and oversight by senior officers at the detention site and by senior officers and attorneys at our HQS.
- To conduct continuous internal reviews of the program to identify potential problems and aberrations, and to take immediate remedial actions to address them.
- To keep detailed records on all program activities, particularly the physical and mental health of detainees.
- While in CIA control, all detainees are afforded US-quality medical, psychological, dental, and vision care and nutritional standards that exceed those of their home countries.

If the Site Manager, any member of the Interrogation team, or CIA Medical Staff member observes any deviation from the DCIA approved Interrogation plan they are obligated to halt the process, discuss their concern with the team and report any deviation immediately to HQS. At any time during this process the Site Manager, any member of the interrogation team, or CIA medical and psychological personnel can declare an end to an interrogation session based on their individual assessment that the detainee may suffer significant long-term harm to his physical and mental health. This extensive oversight, along with the checks and balances, was purposely built into the Program in order to prevent any perceived abuse or "freelancing".

IMPACT

The CIA's Rendition and Detention program has disrupted the plans and activities of terrorist operatives, enabled the collection of a high volume of critical intelligence and led to captures of additional High Value Targets. Each rendition degrades the operational capability of al-Qa'ida and its terrorist allies and helps safeguard the US homeland from attack.

[redacted]

[redacted]

- Intelligence acquired through the interrogation program has helped us identify and capture key operatives such as KSM, Hambali, Janat Gul, Sharif al-Masri, Abu Musab al-Baluchi, and Ahmed Ghailani.

- We would not have succeeded in overcoming the resistance of KSM, Abu Zubaydah, and other equally resistant HVDs without the application of EITs by trained and certified CIA interrogators at our overseas detention facilities. As in the case of all HVDs we have interrogated, the graduated application of enhanced measures enabled us to acquire access to the vast store of intelligence KSM and AZ had withheld from us.

[redacted]

- CIA transferred 14 detainees into DoD custody on 4 September 2006 and are now being held at Guantanamo Bay awaiting prosecution.

Chronology of CIA High-Value Detainee Interrogation Technique

(~~TS~~/[redacted]/~~NF~~) **MARCH 2002**: Abu Zubaida was captured in March 2002 and, in the process, was severely wounded. Once stabilized, he was rendered to a blacksite and treated by Agency sponsored physicians.

- When it was determined he had recovered to a point where he could be safely exploited for actionable information, he was interrogated by both CIA and FBI officers.
- At this point there was no CIA interrogation program and the only techniques being used were sleep deprivation, dietary manipulation, and loud music/white noise.
- CIA believed AZ was withholding valuable information that would not be acquired through use of these techniques. CIA therefore sought to develop other, effective, and legal techniques to use.

(~~TS~~/[redacted]/~~NF~~) **JULY 2002:** Based on the 17 September 2001 Presidential Memorandum of Notification (MON) authorizing CIA [redacted] to undertake operations designed to capture and detain persons who pose a continuing a serious threat of violence or death to US persons and interests - CIA established its own in-house Detention and Interrogation Program to be managed by the CIA CounterTerrorism Center.

(~~TS~~/[redacted]/~~NF~~) **AUGUST 2002 TO JUNE 2004:** CIA submitted the following Enhanced Interrogation Techniques for Department of Justice (DOJ) approval. These were selected based on research conducted by the military that they do not/not produce injuries or long lasting effects when applied correctly. In an August 2002 written opinion, DOJ advised that the techniques would not constitute torture. (See Appendix A for additional details.)

Attention Grasp
Facial hold
Stress positions
Cramped confinement
Use of harmless live insects (never utilized)
Sleep deprivation
Walling
Water Board
Wall standing
Facial slap

[redacted]

Less-aggressive Standard Techniques, including dietary manipulation, loud music/white noise, nudity and use of diapers were also available for CIA use, though not submitted to DOJ for review in 2002.

(~~TS~~[redacted]~~//NF~~) **JUNE 2004:** An internal Senior Agency Review of the CIA Program in Response to the DCI Query (Memo NR 171-04, dated 30 June 2004), refined the CIA detention program. Changes included dropping the distinction between Standard and Enhanced Techniques after determining that many activities within the "Standard Techniques" category (such as white noise and use of shackling) were really security measures and not used for the purpose of eliciting information. CIA reclassified its available techniques into the following list of thirteen (13) techniques (See Appendix B for additional details.):

Stress Positions
Dietary Manipulation
Nudity
Facial Slap
Attention Grasp
Water Dousing

Water Board

Wall Standing
Cramped Confinement
Walling
Facial Hold
Abdominal Slap
Sleep deprivation (more than 48 hours)

(~~TS~~[redacted]~~//NF~~) **MAY 2005:** DOJ provides legal opinions that the 13 interrogation techniques do not violate the torture statute nor would they violate U.S. obligations under Article 16 of the Convention Against Torture, which precludes the use of cruel, inhuman or degrading treatment or punishment, were that article to apply.

(~~TS/~~[redacted]~~//NF~~) **DECEMBER 2005:** DCIA (Porter Goss) suspended use of all techniques in anticipation of enactment of the Detainee Treatment Act of 2005 (aka the McCain Amendment) pending a new policy, operational and legal review. As a result of that review, CIA determined for policy and operational reasons to proceed using only seven (7) of the thirteen (13) techniques. The primary reason for proceeding with only seven (7) EIT's was a recognition that in passing the McCain Amendment, Congress had signaled its lack of support for aggressive counterterrorism programs and therefore the program should be curtailed for prudential reasons to avoid putting CIA officers in jeopardy of vexatious civil or criminal litigation. DOJ was on the verge of issuing a legal opinion that the revised program complied with U.S. law when the Supreme Court returned on the Hamdan decision, thereby providing that War of Terror detainees were entitled to the protections of Common Article 3 of the Geneva Conventions. The Hamdan Decision thus required a complete legal, policy and operational reassessment of the program. The seven (7) Techniques under review were:

Conditioning Techniques: Dietary manipulation, Sleep deprivation, Nudity

Corrective Measures: Abdominal Slap, Attention Grasp, Facial Hold, Facial Slap

(~~TS~~/[redacted]NF) **DECEMBER 2005 TO JULY 2007:** No Enhanced Interrogation Techniques were authorized for use on any detainee from December 2005 to July 2007. During that timeframe, one (1) detainee, Abdul Hadi Al-Iraqi, was captured and debriefed without the use of Enhanced Interrogation Techniques.

~~(TS/~~[redacted]~~/NF)~~ **JULY 2007:** Mohammed Rahim detained. It was determined that Enhanced Interrogation Techniques would be required for the effective exploitation of the resistant detainee.

- On 20 July, the President signed Executive Order 13440 on Common Article 3, and DOJ issued a legal opinion finding CIA's six Enhanced Interrogation Techniques were lawful. Nudity had been removed from the program to reach unanimous policy support among the NSC Principals. The DCIA issued Guidelines on Interrogations Conducted Pursuant to Presidential Memorandum of Notification of 17 September 2001 [redacted] (See Appendix C for additional details.): The six EITs are:

Sleep Deprivation
Facial Hold
Dietary Manipulation
Facial Slap
Attention Grasp
Abdominal Slap

- The Guidelines authorizing the above techniques included language which limited Sleep Deprivation no more than 180 hours in a 30-day period, and provided a mathematical formula with which to determine the caloric requirements authorized under Dietary Manipulation. The above Enhanced Interrogation Techniques represent the current authorities under the 20 July Memorandum.
- Under the current DOJ opinion ,Sleep Deprivation, lacks the efficacy of its previous application. [redacted] would like to see Sleep Deprivation returned to the standard previously determined as lawful by DOJ in 2005. The current and previous standard set the maximum allowable duration for sleep deprivation as 180 hours after which the detainee must be permitted to sleep without interruption for at least eight hours. [redacted] recommends removal of the 30 day restriction, since it allows the detainee to rebuild his resolve. [redacted] believes removal of this restriction will deny the detainee this opportunity, maintaining his sense of loss of control. It is not clear,

however, that the law as it exists today would permit removing the 30-day restriction.

(~~TS~~[redacted]~~/NF~~) RESULTS OF OCTOBER 2006 SENIOR INTERROGATOR REVIEW OF EITS

(~~TS/~~[redacted]~~/NF~~) In October 2006, a panel was convened of Senior Interrogators, Psychologists and RDG management to review past EITs, and to provide DCIA with a final list of EITS for use in the Rendition Detention and Interrogation Program (RDI) in light of the Military Commissions Act of 2006. The panel considered the efficacy of each EIT based on experience during past use with High Value Detainees (HVD). The panel then came to a conclusion regarding whether or not the technique was likely to add significantly to the ability to quickly induce an exploitable state of mind. Based on the experience of the senior interrogators, some of the techniques were thought to be less crucial in inducing an exploitable state of mind, given both the pros and cons of their use. In the opinion of the panel, these techniques should be **dropped:**

Abdominal Slap (Low-level effect. Detainees quickly acclimated to use of this EIT.)
Cramped Confinement (Effect seldom lasts past initial exposure. Most Detainees quickly come to view the confinement box as a safe place.)
Nudity (Moderate effect, but cultural sensitivities makes use of Nudity risky. If its use is perceived as deliberate humiliation, using nudity as an exploitation technique can set back the intelligence collection process.)
Waterboard. (Significant effect, highly effective, but political sensitivities rule out its use.).

(~~TS/~~[redacted]~~/NF~~) The panel considered the possibility of limiting the recommended list of EITs to only those seven (7) previously identified by CTC in December 2005, as those to retain. However, the panel thought that to do so would result in a program that was significantly less effective and required more time to produce critical, time sensitive intelligence than the previous RDI Program. The panel was unanimous in identifying Sleep Deprivation and Walling as the two (2) most important EITs for inclusion in the future CTC Exploitation and Interrogation Program. The panel recommended making available for use several of the 13 EITs determined to be lawful by DOJ in May 2005 that were subsequently dropped during the December 2005 review. At that time the panel determined that the following eight (8) EITs are critical to the effectiveness of the CTC HVD Exploitation and Interrogation Program, however [redacted] recommended the seven to remain as part of the program.

- **Sleep Deprivation:** (Significant effect. Focuses the Detainee's attention on his current situation rather than ideological goals. Helps to undermine the Detainee's motivation to continue to withhold information.)
- **Walling**: (Significant effect. Very effective when combined with sleep deprivation and used as part of conditioning a program.)
- **Dietary Manipulation:** (Mild effect) Helps undermine the Detainee's motivation to continue withholding information.
- **Water Dousing**: (Moderate effect) Useful as part of a conditioning program, but not as useful as walling.)
- **Attention Grasp**: (Mild effect) Useful in the moment to disrupt or correct inattentive or contemptuous Detainee behavior.)
- **Stress Positions:** (Moderate effect) Useful as part of a conditioning program based on randomization of EITs. Should include wall standing, since it is a stress position)
- **Facial Hold**: (Mild effect) Useful in the moment to disrupt or correct inattentive or contemptuous Detainee behavior.)
- **Facial Slap**: (Moderate effect) Useful in the moment to disrupt or correct extremely inattentive, arrogant, or contemptuous Detainee behavior, but must be used judiciously since facial slaps are highly insulting to some cultures and could set back the interrogation and exploitation process.)

Appendix A

(~~TS~~[redacted]/~~NF~~) 2002 Original Interrogation Techniques

Standard Measures:

- Isolation
- White noise or loud music (at a decibel level that will not damage hearing)
- Continuous light or darkness
- Restricted diet (sufficient to maintain general health)
- Shackling (for security or sleep deprivation purposes)
- Sleep deprivation (up to 48 hours)
- Shaving
- Stripping
- Diapering
- Hooding (for limited periods or transport)
- Uncomfortable cool environment

Enhanced Measures*:

- Facial slap (open-handed)
- Facial hold
- Attention grasp
- Sleep deprivation over 48 hours**
- Walling
- Stress positions
    - Kneeling
    - Forehead on wall
- Cramped confinement (boxes)
- Waterboard
- Wall Standing
- Insects

* On site medical and psychological presence required
** Reduced from 72 hours to 48 hours in December 2003
***Previously termed "water dousing", and treated as a standard measure

Appendix B

(~~TS~~/[redacted]/NF) 2005 Interrogation Techniques after Senior [redacted] Assessment

Detention Conditions:

- Shaving
- Security Shackling
- Hooding (while in transport)
- Isolation
- White noise or loud music (Not to Exceed 79 decibels – a decibel level that will not damage hearing)
- Continuous light

Interrogation Techniques:

- Sleep deprivation
- Nudity
- Dietary Manipulation
- Facial Slap (open-handed)
- Facial hold
- Attention grasp
- Abdominal slap (back-handed)
- Walling
- Stress positions
- Wall Standing
- Cramped confinement (boxes)
- Water Dousing (including pour, flick, and toss)
- Waterboard

Appendix C

(~~TS~~[redacted]/~~NF~~) Current Interrogation Techniques

- Sleep deprivation
- Dietary Manipulation
- Facial slap (open-handed)
- Facial hold
- Attention grasp
- Abdominal slap (back-handed)

Intelligence collected after application of EITs:

Results: CIA's use of DOJ-approved enhanced interrogation techniques, as part of a comprehensive interrogation approach, has enabled CIA to disrupt terrorist plots, capture additional terrorists, and collect a high volume of critical intelligence on al-Qa'ida. We believe that intelligence acquired from these interrogations has been a key reason why al-Qa'ida has failed to launch a spectacular attack in the West since 11 September 2001. Key intelligence collected from HVD interrogations *after* applying interrogation techniques:

- The Karachi Plot: This plan to conduct attacks against the US Consulate and other US interests in Pakistan was uncovered during the initial interrogations of Khallad Bin Attash and Ammar al-Baluchi and later confirmed by KSM, who provided additional information on the Karachi plot and confirmed al-Qa'ida's collaboration with local Pakistani extremists. KSM provided information on the Karachi plot after we showed him "capture" photos of Ammar and Khallad, and he confirmed al-Qa'ida's collaboration with local Pakistani extremists.

- The Heathrow Plot: Initial interrogations of Ammar and Khallad resulted in information on this plot to hijack commercial airliners in Eastern Europe and fly them into Heathrow Airport. Using the information from Khallad and Ammar, we confronted KSM and uncovered details on the plot's evolution and the potential operatives involved. Khallad admitted that he had directed Saudi leader Hazim al-Sha'ir to begin locating pilots for the attack.

- The "Second Wave": This was a KSM plot to use East Asian operatives to crash a hijacked airliner into the tallest building on the US West Coast (Los Angeles) as a follow-on to 9/11. We learned this during the initial interrogation of KSM and later confirmed it through the interrogation of Hambali and Khallad.

- The Guraba Cell: We learned of this 17-member Jemaah Islamiyah cell from Hambali, who confirmed that some of the cell's operatives were identified as candidates to train as pilots as part of KSM's "second wave" attack against the US.

- Issa al-Hindi: KSM first identified Issa al-Hindi as an operative he sent to the US prior to 9/11 to case potential targets in NYC and Washington. When shown surveillance photos provided by [redacted] HVDs confirmed al-Hindi's identity. Al-Hindi's capture by the British resulted in the disruption of a sleeper cell and led to the arrest of other operatives.

- Abu Talha al-Pakistani: Khallad and Ammar identified Abu Talha as the leader of the Karachi cell and the Heathrow Plot. The combined intelligence gathered from Khallad, Ammar, KSM, Hassan Ghul, and other HVDs resulted in Abu Talha's recent arrest in Pakistan and the disruption of ongoing plots to target Western interests in London.

- Hambali's Capture: During KSM's interrogation we acquired information that led to the capture of Hambali in August 2003 and to the partial dismantling of the Jemaah Islamiyah leadership in SE Asia. KSM first told us about Majid Khan's role in delivering $50,0000 to Hambali operatives for an attack KSM believed was imminent. We then confronted Khan with KSM's admission and email intercepts confirming the money transfer and Khan's travel to Bangkok. Khan admitted he delivered the money to an operative named "Zubair," whom we subsequently identified and captured. Zubair's capture led to the identification and subsequent capture of an operative named Lilie who was providing forged passports to Hambali. Lilie identified the house in Bangkok where Hambali was hiding. When we confronted Hambali with details of what we knew from other detainees, he admitted that he was grooming the Guraba cell for US operations at the behest of KSM.

- Jafaar al-Tayyar: Tayyar is an al-Qa'ida operative who was conducting casing in the US for KSM prior to 9/11, according to KSM and other HVDs. KSM confirmed that he recruited Tayyar--who is still at large--to conduct a major operation against US interests. KSM described Tayyar as the next Muhammad Atta. Tayyar's family is in Florida and we have identified many of his extremist contacts. Acting on this information, the FBI quickly publicized Tayyar's true name and aggressively followed up with his family and friends in the United States, causing Tayyar to flee the United States. [redacted] and we are actively pursuing his capture. [redacted]

- Dirty Bomb Plot: Abu Zubaydah provided significant information on two operatives, Jose Padilla and Binyam Mohammed, who planned to build and detonate a "dirty bomb" in the Washington DC area. Zubaydah's reporting led to the arrest of Padilla on his arrival in Chicago in May 2003 and to the identification of Mohammad, who was already in Pakistani custody under another identity.

- Shoe Bomber: We learned from KSM and Ammar that Sajid Badat was the operative slated to launch a simultaneous shoe bomb attack with Richard Reid in December 2001. [redacted]

[redacted]

- **Shkai, Pakistan:** The interrogation of Hassan Ghul provided detailed tactical intelligence showing that Shkai, Pakistan was a major Al-Qa'ida hub in the tribal

Topic: Effectiveness of EITs

Assessing the effectiveness of individual EITs is difficult because each interrogation is tailored to a specific detainee and combines EITs and non-coercive measures to maximize impact.

There are numerous factors that effect a detainee's ability to resist the interrogation process, such as:

- physical stamina
- psychological and emotional state
- expectations or insight on how he will be treated by USG authorities
- amount of time he has been held by liaison services or US Military prior to rendition
- treatment received while in liaison or US Military custody

An independent review conducted in 2005 on the efficacy of authorized EITs determined that EITs were generally effective in producing a state of cooperation needed to obtain intelligence.

- One report analyzed data from the RDI Program that indicated EITs—when incorporated into a broader program based on sound intelligence and analysis—did provide useful intelligence.
- Another report concluded that EITs were an integral component of a highly successful program.

Prior to the use of EITs on KSM and Abu Zubaydah, CIA's most prolific intelligence producers, they completely withheld or provided incomplete threat information on actionable targets. Both expressed the belief that the USG lacked the ability and willingness to apply psychological and physical pressures to compel them to cooperate. They subsequently commented that they had believed the USG's legal restraints would provide them opportunities to stall and obfuscate.

- **Abu Zubaydah—our most "analytical" detainee—commented that the EITs offer a justification for committing the "sin" of voluntarily providing information, and noted that he probably would not have provided the amount of information he did without their use. He said the knowledge that the USG was willing and able to use EITs was an effective persuasion.**

Topic: Abu Zubaydah's EIT Process

Abu Zubaydah was captured 27 March 2002 and rendered to CIA custody on 31 March. On 1 August, CIA secured formal written approval from the DoJ's office of Legal Counsel for the EITs of waterboarding, confinement box/cramped confinement, attention grasp, walling, facial hold, facial slap, wall standing, stress positions, sleep deprivation, use of diapers, and use of harmless insects (not employed).

Approvals:

- DCIA discussed these proposed EITs with the National Security Adviser on 17 July, who advised CIA that we may proceed.
- On 13 July, CIA's acting General Counsel and Chief, CTC Legal provided a full brief to NSC Legal Adviser John Bellinger, Deputy NSC Legal Adviser Bryan Cunningham, Deputy Assistant Attorney General Michael Chertoff, Head of the Criminal Division at DoJ, and Chief of Staff to the FBI Director Dan Levin on the proposed EITs, with particular emphasis on details of waterboarding.
- In a 17 May 2002 briefing on the general interrogation plan, Assistant to the President for National Security Affairs Condoleeza Rice, Deputy Assistant to the President for National Security Affairs Stephen Hadley, NCS Legal Adviser John Bellinger, and White House Counsel Al Gonzales were informed that Abu Zubaydah was subject to interrogation methods that while lawful did not necessarily comport with methods used by traditional law enforcement personnel or military interrogators, including denial of clothing, constant illumination of his detention cell, intermittent use of loud music or white noise, and other techniques designed to maximize psychological pressure.
- The Office of Legal Counsel (OLC) at DoJ advised CIA that the legal statute applicable to criminalizing infliction of severe physical or mental pain or suffering did not prohibit the EITs. OLC found that waterboarding did not violate the statute because while it posed an imminent threat of death no prolonged mental harm attached to its use and it did not have the specific intent to inflict severe pain or suffering. The "mock burial" technique was not approved for legal and policy reasons.

Why did CIA employ EITs?

The time lag between Abu Zubaydah's rendition to CIA custody and employment of EITs—from late March to early August 2002—allowed Abu Zubaydah to recuperate from serious wounds suffered during his capture by Pakistani [redacted] to assess Abu Zubaydah's level of participation.

- Debriefings from April to May 2002 by CIA officers and FBI special agents produced preliminary intelligence on threats to the US Homeland and US interests overseas, but the exploitation team assessed that Abu Zubaydah's motivation to provide actionable threat information declined as he became increasingly confident in his environment and the limitations of interrogation measures.

- In early debriefings, Abu Zubaydah identified Khalid Shaykh Muhammad (KSM) and discussed some aspects of KSM's operations, and he provided a basic description that led to the identification of two individuals detained by Pakistani authorities as US-bound operatives Jose Padilla and Binyam Muhammad. The exploitation team noted that during this time frame—while still recovering from his wounds—Abu Zubaydah suffered from diminished mental efficiency and fatigue, and likely perceived himself as vulnerable and dependant upon US medical staff for survival.

As his conditions improved in May 2002, Abu Zubaydah appeared increasingly confident in testing the limits of interrogators' responses to his denial of access to operational information and senior al-Qa'ida leaders, even when confronted with implicating voice intercepts. Abu Zubaydah also indicated that he expected a near-term end to his interrogations and transfer to military custody.

- In response to Abu Zubaydah's declining participation in debriefings, the [redacted] initiated a period of isolation in May punctuated with periodic direct questioning on threat information to dislocate his expectations, erode his sense of control, and raise his desire for social interaction.
- The [redacted] noted Abu Zubaydah's high level of self-discipline, ability to remain focused under stressful and disorienting conditions, and capacity for complex thinking. As emir of Khaldan, Abu Zubaydah developed the camp's security course based on al-Qa'ida's training course that included counterinterrogation measures. Abu Zubaydah had previously acted as emir of al-Qa'ida's al-Faruq camp, and in this capacity had interrogated trainees suspected of being spies. [redacted]

Results:

Prior to EITs, Abu Zubaydah often remained evasive when confronted with sensitive topics, offered vague or historical information, resorted to speculative statements on a myriad of possible methods for US attacks, feigned pain or fatigue, and altered information he had previously provided in an attempt to confuse interrogators. Upon implementation of aggressive interrogation methods—which then included the standard EITs of isolation and nudity—the exploitation team observed a marked change in Abu Zubaydah's willingness to provide relevant operational details

- The [redacted] noted that—for the first time—Abu Zubaydah requested to speak with interrogators to disclose additional information, began utilizing the writing material previously provided to outline threat information, and generally addressed relevant details without prompting.

EITs USED WITH CIA DETAINEES

	Detainee	Destination	Sleep Dep	Nudity	Dietary	Facial Hold	Attention Grasp	Abdominal Slap	Facial Slap	Stress Positions	Cramped Confinement	Water Dousing	Walling	Water Board	
[redacted]															[redacted]
	Suleiman Abd al-Allah	[redacted]	X	X			X	X	X		X	X	X		[redacted]
	Al-Sharia'ya (Abd al-Karim)		X	X	X	X	X	X	X	X	X	X	X		[redacted]
[redacted]															[redacted]

3/27/2003

[redacted]

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[redacted]

CENTRAL INTELLIGENCE AGENCY

Office of Inspector General

REPORT OF AUDIT

(~~TS/~~ (b)(1) (b)(3) NatSecAct [redacted]

CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification

Report No. 2005-0017-AS

(b)(3) CIAAct
(b)(3) NatSecAct
[redacted]

006

14 June 2006
ISSUE DATE

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(b)(3) CIAAct [redacted]

14 June 2006

MEMORANDUM FOR: Acting Executive Director

FROM: John L. Helgerson
Inspector General

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SUBJECT: (TS/[redacted]NF) Report of Audit: CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification (2005-0017-AS)

(b)(1)
(b)(3) NatSecAct

1. (TS/[redacted]/NF) Attached is our final report on CIA-controlled detention facilities operated under the 17 September 2001 Memorandum of Notification. Recommendation 1 is directed to you. It is my understanding that you are in agreement with the recommendation. Please provide me a written response within 60 days setting forth the actions that have been taken to implement the recommendation and/or a timetable for eventual implementation.

2. (U) All of the recommendations in the report are considered significant. The status of the recommendations, as well as corrective actions taken to address them, will be included—in an appropriately sanitized way—in the Inspector General's next semiannual report to the Director, Central Intelligence Agency.

3. ~~(S)~~ This audit responds to a recommendation in the Classified Annex to the Joint Explanatory Statement of the Committee of Conference accompanying the Intelligence Authorization Act for Fiscal Year 2002 that the Central Intelligence Agency Inspector General audit each covert action program at least every three years. Our report will be provided to the Congressional oversight committees 30 days from the date of this memorandum.

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(b)(3) CIAAct [redacted]

14 June 2006

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Report of Audit

(~~TS~~/[redacted]~~NF~~) CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification

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(U) EXECUTIVE SUMMARY

(~~TS~~/[redacted]~~NF~~) The objectives of this audit were to determine whether the Central Intelligence Agency (CIA):

- Developed and adhered to appropriate standards and guidelines for operating CIA-controlled detention facilities and maintaining detainees.
- Maintained adequate records of the detention facilities and the detainees.

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(~~TS~~/[redacted]~~NF~~) CIA-controlled detention facilities operated by the National Clandestine Service (NCS) CounterTerrorism Center (CTC), Renditions and Detainees Group (RDG) were constructed, equipped, and staffed to securely and safely contain detainees and promote intelligence exploitation of detainees. Detainees at facilities operated by CTC/RDG are provided essentials of shelter, clothing, nourishment, and hygiene; medical and psychological examinations and treatment; limited dental and vision care; opportunities for physical exercise and intellectual, religious, and recreational pursuits; and daily contact with facility staff. Detainees are held in solitary confinement in climate-controlled, lighted, aboveground, window-less cells [redacted] that are equipped with a mattress, a sink, and a toilet. At the time we visited the [redacted] CIA-controlled detention facilities in use, no detainees were being interrogated; all detainees were in the debriefing phase of their confinement. None of the detainees showed any apparent physical signs of mistreatment.

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(~~TS~~/[redacted]~~NF~~) CTC/RDG is responsible for ensuring that each detention facility is properly staffed and has developed a staffing plan for each facility in response to a recommendation contained in a prior Office of Inspector General (OIG) report—*Special Review – Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)* (2003-7123-IG, May 2004). At the time that we visited the [redacted] detention facilities in use, except for a shortage of debriefers, the facilities were staffed with sufficient numbers and types of personnel, including chiefs of base (COBs), support officers, communications officers, security officers, interrogators, and linguists, as detailed in the staffing plans. Personnel from CTC; the CIA Office of General Counsel (OGC); and the CIA Directorate of Support, Office of Medical Services (OMS) [redacted] developed generally sufficient

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standards and guidelines for operating CIA-controlled detention facilities, maintaining the health of detainees, and safely handling detainees. Facilities' staffs generally followed the standards and guidelines in the conduct of their duties and responsibilities. With minor exceptions, responsible officials maintained adequate records of the detainees confined at CIA-controlled detention facilities operated by CTC/RDG. However, additional or more detailed standards, guidelines, plans, and training are needed to address certain areas of weakness in detention facilities' operations that could jeopardize the health and safety of both detainees and detention facility staff.

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(~~TS~~/[redacted]~~NF~~) CTC/RDG detention facilities are not equipped to provide medical treatment to detainees who have or develop serious physical or mental disorders, and operable plans are not in place to provide inpatient care for detainees. Facilities' staffs do not have immediate access to critical information on detainees that may be needed to safely and effectively respond to a medical emergency. CIA officers and other personnel at CTC/RDG detention facilities have not been trained in safe food handling and preparation, and standards and procedures designed to avoid the introduction and transmission of food-borne illnesses have not been instituted at the facilities. [redacted]

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(~~TS~~[redacted]~~NF~~) CIA-controlled detention facilities have experienced a shortage of qualified debriefers, which may have negatively impacted intelligence exploitation of detainees. Some CIA personnel who successfully completed a special training program to be debriefers of high value detainees (HVDs) have been unavailable for temporary assignment to detention facilities. [redacted]

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Assistant Inspector General for Audit

(U) BACKGROUND

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(U) AUDIT RESULTS AND RECOMMENDATIONS

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(~~TS~~/[redacted]NF) The CounterTerrorism Center Program for Operating Detention Facilities Has Been Effective

(~~TS~~/[redacted]~~NF~~) CTC/RDG's program for operating detention facilities has been effective in providing secure and safe custody of persons detained by the CIA under authority of the 17 September 2001 MoN. The CIA-controlled detention facilities that were in operation during the time of our audit were constructed, equipped, and staffed to provide detainees essentials of shelter, clothing, nourishment, and hygiene; medical and psychological examinations and outpatient treatment; limited dental and vision care; opportunities for physical exercise and intellectual, religious, and recreational pursuits. CIA officials developed generally sufficient standards and guidelines for operating CIA-controlled detention facilities, maintaining the health of detainees, and safely handling detainees. We found that personnel assigned to CIA-controlled detention facilities, for the most part, complied with the standards and guidelines in carrying out their duties and responsibilities. At the time we visited the detention facilities, no detainees were being interrogated; all detainees were in the debriefing phase of their confinement. None of the detainees at the time that we visited the [redacted] detention facilities operated by CTC/RTG showed any apparent physical signs mistreatment.

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(~~TS~~[redacted]~~NF~~) CTC/RDG Detention Facilities Were Designed To Meet Program Requirements and Standards

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(~~TS~~/[redacted]~~NF~~) CIA-controlled detention facilities operated by CTC/RDG were designed, constructed, and equipped to securely and safely contain detainees and to promote intelligence exploitation of detainees. We visited the [redacted] detention facilities that were in use at the time of our audit—[redacted] [redacted] CTC/RDG manages the detention facilities twenty-four hours a day with CIA staff and cleared contractor personnel. Detainees are held in solitary confinement; they generally are not physically restrained while in their cells. Detainees are held in climate-controlled, lighted, aboveground, window-less cells—[redacted]—that are equipped with a mattress, a sink, and a toilet. Detainees are provided three balanced meals per day, adequate clothing, and access to showers and personal hygiene products. Detention facilities' staff personnel consult with an OMS dietician regarding detainees' meal plans and nutritional requirements. Each detention facility has an exercise room, which detainees are encouraged to use.

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(~~TS~~/[redacted] ~~NF~~) Detainees are given medical examinations every six to eight weeks, or more often if required by the detainee's medical condition. OMS physicians and physician assistants—both Headquarters-based personnel and regional medical officers—travel to the detention facilities to conduct medical examinations. [redacted] (b)(3) CIAAct CTC/RDG has also arranged for limited dental and vision care for detainees.

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(~~TS~~/[redacted] ~~NF~~) Facilities' staffs are sensitive to the detainees' religious and cultural requirements. Detainees have access to the Koran and the Bible, a prayer rug, a prayer schedule, and a clock, and they are provided uninterrupted time for daily prayer. Detainees are served meals that conform with their religious and cultural requirements, and special provisions are made to accommodate detainees' customs associated with religious observances. To help alleviate the impact of prolonged solitary confinement, detainees may be provided access to selected books, movies, and games. Facilities' staffs make an effort to have daily contact with each detainee during debriefings, rapport-building sessions, informal cell visits, and when delivering meals. The Director, CIA CounterTerrorism Center (Director, CTC) has advised us that, beginning in February 2006, select detainees individually have been afforded "social visits" with another detainee for approximately one hour in a controlled and monitored setting. Social visits are an amenity that must be earned, and the Director, CTC believes that they have had a positive impact on detainees' behavior and coping skills.

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(~~TS~~/[redacted] ~~NF~~) CTC/RDG is responsible for ensuring that each detention facility is properly staffed and has developed a staffing plan for each facility in response to a recommendation contained in a prior OIG report—*Special Review – Counterterrorism Detention and Interrogation Activities (September 2001 – October 03)* (2003-7123-IG, May 2004). At the time we visited the [redacted] detention facilities in use, except for a shortage of debriefers, the facilities were staffed with sufficient numbers and types of personnel, including COBs, support officers, communications officers, security officers, interrogators, and linguists, as detailed in the staffing plans. [redacted] officers were providing physical security at the facilities and had responsibility for the safety of both facility staff and detainees at the time of our site visits. [redacted]

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~~(TS/~~[redacted]~~NF)~~ [redacted] are discussed in Exhibit B of this report. During the audit, we visited another facility designed and built to be a CIA-controlled detention facility—[redacted] [redacted] is unique among the facilities in the CTC/RDG program in that it was designed for [redacted] [redacted] was completed in [redacted] at a cost of approximately [redacted] million, but has not been used. Senior CTC officials told us that not all [redacted] approvals have been received for its use by the CIA. We also obtained information on but did not visit [redacted] other CIA-controlled detention facilities that either were not in use or were under construction at the time of our audit. [redacted] and the [redacted] other detention facilities that were not in use are discussed in Exhibit C of this report.

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(U//~~FOUO~~) Standards, Guidelines, and Recordkeeping Are Generally Sufficient

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~~(TS/~~[redacted]~~NF)~~ Personnel from CTC, OGC, OMS, and [redacted] developed generally sufficient standards and guidelines for operating CIA-controlled detention facilities, maintaining the health of detainees, and safely handling detainees. Facilities' staffs generally followed the standards and guidelines in the conduct of their duties and responsibilities. With minor exceptions, responsible officials maintained adequate records of the detainees confined at [redacted] (b)(1) (b)(3) NatSecAct [redacted]

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~~(TS/~~[redacted]~~NF)~~ OGC and OMS personnel promulgated guidance on the care and treatment of detainees. The *DCI Guidelines on Interrogations* and the *DCI Guidelines on Confinement Conditions for CIA Detainees* govern the conduct of interrogations and the conditions of confinement for detainees.[1] The OMS guidelines provide general guidance on medical and psychological issues during: (1) rendition and initial interrogation, (2) sustained debriefing, and (3) long-term care. Although the DCI and OMS guidelines contain appropriate provisions, they speak in very general terms concerning how the guidelines and standards contained therein should be implemented. The DCI and OMS guidelines are discussed in Exhibit D of this report.

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~~(TS/~~[redacted]~~NF)~~ To supplement the DCI and OMS guidelines, RDG has developed and issued a number of standard operating procedures (SOPs) that address the day-to-day operation of its detention facilities. The SOPs address: staffing of the facilities, biweekly reporting of detainees' confinement conditions, managing books and other print media provided to detainees, development of meal plans, cutting

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[1] ~~(TS/~~[redacted]~~NF)~~ The guidelines are currently under revision in response to a recommendation contained in a prior OIG report—*Special Review – Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)* (2003-7123-IG, May 2004).

and trimming detainees' hair and beards, and handling of detainees in a variety of situations. Officials at each of the detention facilities established additional SOPs, based on each facility's operational environment, [redacted] [redacted] and the provision of additional amenities to detainees.

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(~~TS~~/[redacted] ~~NF~~) COBs at detention facilities maintain SOPs in read-in files at each facility and require all permanently assigned and temporary duty personnel to read and acknowledge the procedures in writing upon arrival. SOPs have been updated as needed to reflect the changing operational environment. Other records related to detention facilities and detainees, such as detainees' medical records, are available electronically and in hard copy files maintained at Headquarters.

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(~~TS~~/[redacted]/~~NF~~) Certain Areas of Weakness in Detention Facilities' Operations Need To Be Addressed

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(~~TS~~/[redacted] ~~NF~~) CIA officials developed generally sufficient standards and guidelines for operating CIA-controlled detention facilities, maintaining the health of detainees, and safely handling detainees. However, additional or more detailed standards, guidelines, plans, and training are needed to address certain areas of weakness in detention facilities' operations that could jeopardize the health and safety of both detainees and detention facilities' staffs.

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(~~TS~~/[redacted] ~~NF~~) Operable Plans Are Needed for Providing Inpatient Treatment for Detainees

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(b)(3) NatSecAct

(~~TS~~/[redacted] ~~NF~~) CTC/RDG detention facilities are not equipped to provide medical treatment to detainees who have or develop serious physical or mental disorders, and operable plans are not in place to provide inpatient care for detainees. As a result, there have been delays in providing necessary medical treatment for detainees, and CIA funds have been wasted in constructing and equipping a medical facility that was later determined not to be a viable option for providing inpatient care for detainees.

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(~~TS~~/[redacted] ~~NF~~) At least [redacted] detainees in CTC/RDG detention facilities have physical illnesses or conditions that require the detainees to be hospitalized for treatment. [redacted] [redacted] was diagnosed with hepatitis C in September 2003 and should have a liver biopsy performed. [redacted]

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[redacted] In August 2005, an OMS officer discovered during a routine medical examination that [redacted]

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[redacted] Although most detainees are in good physical health, the possibility exists of an unforeseen acute medical condition that would require a detainee to be immediately hospitalized. In December 2005, symptoms exhibited by [redacted] that, at first suggested appendicitis, were determined to be attributable to kidney stones, and [redacted] was successfully treated at [redacted]

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(~~TS/~~[redacted] ~~NF~~) The guidelines issued by OMS recommend that, in situations where a detainee's medical condition cannot be adequately treated at the detention facility, detention facility staff and local CIA station personnel arrange access to the host country's health care system [redacted] CTC/RDG detention facilities have not experienced a medical emergency that required the cooperation of the host-country [redacted] in arranging immediate hospitalization for a detainee. OMS officials told us that treatment of detainees with non-emergency inpatient requirements had been deferred until [redacted] became operational. CTC and OMS officials anticipated that [redacted] proximity to a US Department of Defense (DoD) facility would make it convenient to obtain treatment for CIA detainees at a DoD military hospital. [redacted] came into CIA custody requiring additional medical treatment and was treated at a US military hospital. But [redacted] has not become operational, and CTC and OMS officials told us that the CIA is currently denied access to all DoD medical facilities to obtain treatment for CIA detainees. CIA station and base personnel sought support in obtaining medical treatment for detainees from host-country [redacted], but they have had limited success. [redacted] have reneged on previous assurances that they would arrange inpatient treatment or have declined to become involved in providing medical treatment for CIA detainees. The medical facilities and personnel of certain foreign countries that have agreed to provide medical treatment for CIA detainees have been determined by OMS personnel to be of unacceptable quality. In March 2006, CTC, OMS, and CIA station personnel obtained medical treatment for [redacted] at a third-country medical facility [redacted] The same country's [redacted] facilitated medical treatment for [redacted] but has indicated its unwillingness to provide treatment for additional CIA detainees.

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(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted] ~~NF~~) As an alternative means of providing inpatient treatment for detainees, CTC/RDG began in May 2005 to construct and equip a medical treatment facility near [redacted] (b)(1) (b)(3) CIAAct (b)(3) NatSecAct (b)(1) (b)(3) NatSecAct The [redacted] medical facility was completed and fully equipped in late December 2005 at a cost of [redacted] million. [redacted] (b)(1) (b)(3) CIAAct (b)(3) NatSecAct medical treatment facility has never been used.

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted] ~~NF~~) Operable plans need to be in place at each CIA-controlled detention facility for providing emergency and non-emergency, inpatient treatment for detainees. The CIA cannot assume that in exigent circumstances the host-country [redacted] will be willing and capable of providing support, and it appears that access to DoD medical facilities is not currently an option. The *DCI Guidelines on Confinement Conditions for CIA Detainees* require that provisions be made to protect the welfare of detainees, including the provision of adequate medical care. However, the guidelines do not assign responsibility for ensuring that detainees are provided necessary medical treatment. Although the security aspects of providing inpatient treatment for detainees will need to be coordinated closely with each detention facility staff and local CIA station personnel, the substantive knowledge of OMS personnel makes them better suited to make critical decisions concerning the viability of plans for providing inpatient care for detainees.

[redacted]
(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(3) CIAAct
(b)(5)

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

~~(TS/~~[redacted]~~NF)~~ Timely Access to Critical Medical Information on Detainees Is Needed in the Field

(b)(1)
(b)(3) NatSecAct

(~~TS~~[redacted]~~NF~~) Critical medical information on detainees is not immediately available to the staff of CIA-controlled detention facilities. Program officials told us that medical files on detainees are not maintained at each detention facility [redacted]

(b)(1)
(b)(3) NatSecAct

According to program officials, a medical officer at a detention facility who needs medical information on a detainee can either contact Headquarters, where medical files on all detainees are maintained, or search through the facility's cable database for medical information. Both of these options are dependent on the detention facility's access to [redacted] A search of the detention facility's cable database for medical information, in addition to being time consuming, would yield information on a particular detainee only for the period that the detainee was held at that facility. Neither option appears to be a viable solution when immediate medical information on a detainee is needed to respond to a medical emergency.

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct [redacted]

(~~TS~~/[redacted]/~~NF~~) Detention facility managers and OMS officers told us that, because of the number of detainees with chronic medical conditions and the lack of on-site medical personnel at [redacted] they believe it necessary to have hardcopy records containing critical medical information on detainees available at detention facilities. The on-site medical records need not contain a complete medical history of a detainee and the results of every medical and psychological examination, but should contain critical information needed to safely and effectively respond to a medical emergency involving the detainee, such as information on chronic illnesses, medical conditions, and behavioral problems; allergies to particular medications; or contagious diseases requiring special handling of the detainee during treatment.

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted]/NF) **Recommendation 3 (significant):** ***For the Chief of Medical Services in coordination with the Chief, CounterTerrorism Center, Renditions and Detainees Group:*** **Maintain hardcopy records at CIA-controlled detention facilities that contain critical information that may be needed by facility staff and medical personnel to safely and effectively respond to a medical emergency involving a detainee.**

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted]/~~NF~~) In comments on a draft of this report, the Chief of Medical Services stated that hardcopy medical summaries that include information on detainees' medical conditions, medications, allergies, and blood-borne pathogens have been provided to each detention facility for retention and reference in the event of a medical emergency. The Chief of Medical Services provided us copies of the medical summaries. Recommendation 3 is closed.

(b)(1)
(b)(3) NatSecAct

(U//~~FOUO~~) Facilities' Staffs Lack Training in Safe Food Handling and Preparation

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted]/~~NF~~) CIA officers and other personnel at [redacted] [redacted] have not been trained in safe food handling and preparation. [redacted] officers at [redacted] prepare, portion, and serve all meals to the detainees. The [redacted] guards at [redacted] prepare and portion detainees' meals in the guards' kitchen; [redacted] officers then serve the meals. [redacted] officers at [redacted] prepare and serve most of the detainees' meals. None of these persons have been trained in safe food handling. We observed certain practices and conditions that were inconsistent with avoiding contamination of food and transmission of food-borne illnesses. For example, we observed an [redacted] officer using the back of his bare hand to check the temperature of a meal he was heating for a detainee. At a detention

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(b)(3) NatSecAct

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(b)(3) CIAAct
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(b)(3) CIAAct
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(b)(3) NatSecAct

facility that has experienced rodent infestation, we noted that the kitchen ar[redacted] (b)(1) (b)(3) NatSecAct s left an unsanitary condition following meal clean up.[2] Staff bathrooms at all [redacted] facilities, including a bathroom immediately adjacent to the kitchen at [redacted] were equipped with communal, cloth towels. In [redacted] 2005, five staff personnel at [redacted] reported acute gastrointestinal illness, which a visiting physician assistant (b)(1) (b)(3) NatSecAct agnosed as giardiasis.[3] Within days, the facility reported similar symptoms in a detainee. The physician assistant believed that the giardia were likely introduced by food or water contamination.

(U) The US Department of Health and Human Services' Centers for Disease Control and Prevention (CDC) and Food and Drug Administration collaborated with the US Department of Agriculture's Food Safety and Inspection Service in 2005 to produce the latest edition of the *Food Code*. The code provides practical guidance and manageable, enforceable provisions for mitigating risk factors known to cause food-borne illness. The code is a reference document for regulatory agencies that ensures food safety in restaurants, retail stores, and institutions, such as nursing homes and child care centers. According to the *Food Code*, there are five major risk factors related to employee behavior and food preparation practices that contribute to food-borne illness: (1) Improper holding temperatures, (2) inadequate cooking, (3) contaminated equipment, (4) food from unsafe sources, and (5) poor personal hygiene. The code recommends standards and practices to address these risk factors, for example, the provision of disposable towels; a continuous towel system that supplies each user a clean towel; or a heated-air hand-drying device at each hand-

(b)(1)
(b)(3) NatSecAct ashing sink.

(~~TS~~/[redacted]/~~NF~~) Incidents of food-borne illnesses at CIA-controlled detention facilities have been rare; the [redacted] 2005 illnesses at [redacted] were (b)(1) (b)(3) NatSecAct only reported cases. However, because of the shortage of appropriate personnel to staff CIA detention facilities, and the difficulty involved in providing inpatient treatment to detainees, the CIA can ill afford outbreaks of food-borne illnesses at its (b)(1) (b)(3) NatSecAct tention facilities that could be prevented by proper food handling and good hygiene practices. Personnel who are involved in the handling and preparation of food at CIA

(b)(3) NatSecAct (b)(1) (b)(3) NatSecAct detention facilities should receive basic training in safe food handling. In addition, standards and procedures designed to avoid the introduction and transmission of food-borne illnesses should be developed and instituted at detention facilities.

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[2] (~~S~~[redacted]~~NF~~) Certain staff living areas at [redacted] including the kitchen, dining area, and bathrooms, are communal in nature; personnel residing at the facilities are responsible for cleaning these areas on a rotating, daily schedule.

[3] (U) The giardia parasite, according to the CDC, resides in the intestine of infected humans or animals. The parasite is found in soil, food, water, or surfaces that have been contaminated with the feces from infected humans or animals, and individuals can become infected after accidentally swallowing something that has come in contact with the feces of a person or animal infected with the parasite. The CDC notes that giardia may be spread via contaminated bathroom fixtures and recommends the washing of hands with soap and water after using the toilet and before eating or preparing food.

(b)(1)
(b)(3) NatSecAct

~~(TS/~~[redacted]~~NF)~~ **Recommendation 4 (significant):** ***For the Chief, CounterTerrorism Center, Renditions and Detainees Group in coordination with the Chief of Medical Services:*** **(1) Provide training in safe food handling for personnel involved in the preparation of meals and handling of food at CIA-controlled detention facilities. (2) Develop and institute standards and procedures designed to avoid the introduction and transmission of food-borne illnesses at CIA-controlled detention facilities.**

(b)(1)
(b)(3) NatSecAct

~~(TS/~~[redacted]~~NF)~~ In comments on the draft audit report, the Director, CTC concurred with the recommendation and provided details of actions taken to implement it. Since [redacted] 2005, CTC/RDG has been working to identify and engage under contract at least [redacted] cleared professional cooks. To date, [redacted] cooks have been engaged. The cooks are assigned to the same facility, and they have instituted cleanliness and sanitation standards and procedures consistent with food service guidelines at that facility. The Chief of Medical Services also advised us in his comments that trained, professional cooks have been retained by CTC and that training and instruction on correct food preparation have been provided to staff and contract personnel assigned to CTC detention facilities.

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(b)(3) NatSecAct

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(b)(3) CIAAct

[redacted]

(b)(1)
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) NatSecAct

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(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct
[redacted]

(b)(1)
(b)(3) NatSecAct

(~~TS~~[redacted]~~NF~~) Policy on Response to the Death of a Detainee Is Needed

(~~TS~~[redacted]~~NF~~) CIA employees and contractor personnel assigned to CIA-controlled detention facilities have not been provided standard procedures for responding to the death of a detainee. In 2003, the Office of Inspector General Investigations Staff initiated an investigation into the circumstances surrounding the November 2002 death of a detainee at [redacted] a CIA detention facility that operated from August 2002 to May 2004.[4]

(b)(1)
(b)(3) NatSecAct

(b)(3) CIAAct
(b)(5)
[redacted]

(b)(1)
(b)(3) NatSecAct
[redacted] However, the lack of formal procedures to be followed in the event of the death of a detainee in CIA custody could cause personnel at these facilities to unintentionally compromise the medical examiner's autopsy or an OIG investigation by disturbing the detainee's body and/or the death scene. Adherence to prescribed procedures in the event of a detainee death could protect facility staff from being wrongly accused of detainee mistreatment or responsibility in the detainee's death. [redacted]

(b)(3) CIAAct
(b)(5)

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

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[4] (~~TS~~[redacted]~~NF~~) CTC/RDG officials told us that the [redacted] facility was not part of the CTC/RDG detention program and was not managed by CTC/RDG at the time of the detainee's death. CTC, Renditions Group, which was renamed CTC/RDG, assumed Headquarters management of [redacted] (b)(1) on December 2002. Prior to that time, other CTC components—[redacted] (b)(3) NatSecAct [redacted] oversaw operations at [redacted] The death of the detainee at [redacted] was reported on by OIG/INV in *Death of a Detainee* (b)(1) [redacted] 2003-7402-IG, 27 April 2005.

(b)(1)
(b)(3) NatSecAct

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(b)(3) NatSecAct

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[redacted]

[redacted]

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(b)(3) CIAAct
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(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]

(b)(3) CIAAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) NatSecAct

~~TOP SECRET~~/[redacted] ~~NOFORN//MR~~

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(~~TS~~[redacted]~~NF~~) A Shortage of Debriefers at Detention Facilities May Have Negatively Impacted Intelligence Collection

(~~TS~~/[redacted]~~NF~~) CIA detention facilities have experienced a shortage of qualified debriefers, which may have negatively impacted intelligence exploitation of detainees. [redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(~~TS~~/[redacted] ~~NF~~) To help ensure that enough qualified debriefers would be available to CIA detention facilities, CTC began a formal program in 2004 to develop a cadre of persons with the necessary skills and requisite knowledge to elicit intelligence from the high value detainees being held in CIA detention facilities. Participants are recommended to the program by their components' management and are required to successfully complete specialized, HVD debriefer training. [redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted] ~~NF~~) Staffing CIA detention facilities with a sufficient number of qualified debriefers is a continuing challenge for CTC/RDG. [redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
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(b)(1)
(b)(3) NatSecAct

(~~TS~~//[redacted]/NF) A shortage of qualified debriefers at detention facilities is an on-going problem, [redacted]

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(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]

(b)(1)
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(b)(3) NatSecAct
(b)(5)

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

Exhibit A

(U) Objectives, Scope, and Methodology

~~(TS~~/[redacted]NF) The objectives of this audit were to determine whether the Central Intelligence Agency (CIA):

- Developed and adhered to appropriate standards and guidelines for operating CIA-controlled detention facilities and maintaining detainees.

(b)(1)
(b)(3) NatSecAct

- Maintained adequate records of the detention facilities and the detainees.

~~(TS~~/[redacted]/~~NF~~) To determine whether the CIA developed and adhered to appropriate standards and guidelines for operating CIA-controlled detention facilities and holding detainees, we:

(b)(1)
(b)(3) NatSecAct

- Reviewed the scope of activities authorized under the [redacted] 17 September 2001 Memorandum of Notification (MoN) [redacted]

(b)(1)
(b)(3) NatSecAct

- Examined guidelines and procedures for the operation of detention facilities over which the National Clandestine Service (NCS), CounterTerrorism Center (CTC) had control between August 2005 and February 2006.

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

- Interviewed current and former officials responsible for CIA-controlled detention facilities from CTC; the Directorate of Support (DS), Office of Medical Services (OMS); the [redacted] [redacted] and [redacted]

(b)(3) CIAAct

(b)(3) NatSecAct

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

- Reviewed cable traffic contained in [redacted] databases, reports, and other documents related to CTC covert action (CA) activities maintained by the NCS [redacted] [redacted] the NCS, Operations and Resource Management Staff; the DS, OMS; and the Office of the Chief Financial Officer.

- Reviewed the National Security Act of 1947, Title 5, *Accountability for Intelligence Activities*; the Central Intelligence Agency Act of 1949, as amended, Section 8; and Executive Orders 12333 and 13354.

- Reviewed CTC/RDG detention program-specific policies, standard operating procedures, and guidelines pertaining to the conduct of CA activities promulgated by the Director of Central Intelligence, CTC, and OMS.

- Assessed the facilities and operations at [redacted]

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(~~TS/~~[redacted]~~NF~~) To determine whether the CIA maintained adequate records of the detention facilities and the detainees, we:

- Reviewed files maintained on each detainee by OMS.

- Reviewed operational files maintained on each detainee by CTC.

(b)(3) CIAAct

- Received a demonstration of CTC's [redacted] record-keeping database.

- Reviewed cable traffic contained in [redacted] databases.

(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct
[redacted]

(~~TS~~//[redacted] ~~NF~~) During the audit, we received assurances from senior CTC officials that we had access to all relevant [redacted] databases and other operational records and that there were no other CIA-controlled detention facilities.

(b)(3) NatSecAct

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted] Because no interrogations were being conducted at the time that we visited the detention facilities, we did not observe any interrogation activities. Moreover, interrogation techniques were not a focus of this audit, and we did not review US Department of Justice guidelines for interrogations, or examine the evolution of interrogation techniques employed at current CIA-controlled detention facilities or predecessor facilities. We did not examine activities associated with the [redacted] renditions of detainees, nor did we examine on a case-by-case basis the justifications for holding particular detainees. We did not assess the value of intelligence obtained from the detainees. We discussed the costs associated with constructing detention facilities with CTC officials, but we did not examine contract and expense documentation.

(b)(1)
(b)(3) NatSecAct

(U) The audit was performed from July 2005 to February 2006 and in accordance with generally accepted government auditing standards. Comments on the draft report were received from the Acting Executive Director; the Director of the National Clandestine Service; the Director for Intelligence; the Acting General Counsel; the Director, CIA CounterTerrorism Center; and the Chief of Medical Services and were considered in the preparation of this report.

[redacted]

(b)(1)
(b)(3) NatSecAct

Exhibit B

(~~TS~~/[redacted] ~~NF~~) CIA-controlled Detention Facilities That Were in Use at the Time of the Audit

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
~~TOP SECRET/~~[redacted](b)(3) NatSecAct~~NOFORN//MR~~
[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]
(b)(1)
(b)(3) NatSecAct
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~~TOP SECRET/~~[redacted] (b)(1) (b)(3) NatSecAct ~~/NOFORN//MR~~

[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) NatSecAct

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[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

~~TOP SECRET/~~[redacted] (b)(1) (b)(3) NatSecAct ~~NOFORN//MR~~

[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

~~TOP SECRET//~~[redacted] (b)(1) (b)(3) NatSecAct ~~NOFORN//MR~~

[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

~~TOP SECRET~~ [redacted] ~~/NOFORN//MR~~

(b)(1)
(b)(3) NatSecAct

[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) NatSecAct

~~TOP SECRET//~~ [redacted] ~~NOFORN//MR~~

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(6)

[redacted]

(b)(1)
(b)(3) NatSecAct

Exhibit C

~~(TS/~~[redacted]~~/NF)~~ Detention Facilities That Were Not in Use or Were Under Construction at the Time of the Audit

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

~~TOP SECRET/~~[redacted] NOFORN//MR

[redacted]

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) NatSecAct

~~TOP SECRET//~~[redacted] NOFORN//MR

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

Exhibit D

(~~TS~~//[redacted]~~NF~~) Guidelines for Managing CIA-controlled Detention Facilities

(b)(1)
(b)(3) NatSecAct

(U//~~FOUO~~) DCI GUIDELINES

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

~~(TS//~~[redacted]~~NF)~~ On 28 January 2003, the Director of Central Intelligence (DCI) signed the *DCI Guidelines on Interrogations* and the *DCI Guidelines on Confinement Conditions for CIA Detainees*. The first set of guidelines applies to CIA employees [redacted] of the CIA engaged in interrogations.

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(TS//[redacted]NF) The second set of guidelines—*The DCI Guidelines on Confinement Conditions for CIA Detainees*—is applicable to individuals held in detention facilities operated under [redacted] control of the CIA. The guidelines mandate that adequate provisions be made to protect the welfare of detainees to include the provision of food and drink, clothing, basic sanitary facilities, medical care, and periods of physical exercise. The guidelines note that although conditions of confinement at detention facilities are not required to conform to US prison or other established standards, detainees should receive periodic evaluations by qualified medical professionals to ensure their well-being, and the results of medical and psychological evaluations of detainees should be documented in appropriate records. The guidelines further require that:

> Officers involved with the construction or operation of detention facilities will be appropriately vetted and trained prior to their assignments.

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(b)(3) CIAAct
(b)(3) NatSecAct

> [redacted]

> The D/CTC will ensure that the designated responsible CIA officer[1] who operates a detention facility, and other officers, both those assigned permanently and those on temporary duty, who participate in any aspect of the CTC/Renditions and Detainees Group (RDG) detention program are provided both sets of DCI guidelines to read, understand, and formally acknowledge by cable.

(b)(1)
(b)(3) NatSecAct

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[1] ~~(TS/~~[redacted]~~NF)~~ The responsible CIA officer is generally the chief of base (COB) at the detention facility.

The guidelines require that a quarterly review be conducted by Headquarters of the conditions at each detention facility and that the review include a written report to the D/CTC, Associate Deputy Director for Operations (ADDO), DDO, General Counsel, Deputy Director of Central Intelligence (DDCI), and DCI.[2]

(b)(1)
(b)(3) NatSecAct

(U//~~FOUO~~) CIA OFFICE OF MEDICAL SERVICES GUIDELINES

(TS/[redacted]NF) The Chief of Medical Services disseminated guidelines concerning medical support to CIA interrogation and detention activities in April 2003 to Office of Medical Services (OMS) personnel assigned to detention facilities.[3] According to OMS, the guidelines were a compilation of previously issued guidance. [redacted] (b)(5) OMS has periodically revised and updated the draft guidelines and disseminated them to all OMS personnel involved in the detention program. In response to a recommendation in the May 2004 Office of Inspector General special assessment (*Special Review—Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, 2003-7123-IG), the guidelines were issued in final in December 2004.[4] The guidelines were revised in (b)(1) (b)(3) NatSecAct ptember 2005.[5]

(~~TS~~/[redacted]NF) The OMS guidelines address three phases of the detention process: (1) rendition and initial interrogation, (2) sustained debriefing, and (3) long-term care. The majority of the guidelines are devoted to the rendition and interrogation phase, as this is the riskiest phase of the detention process and involves aspects of medical/psychological care that are unfamiliar to most OMS officers. The guidance on how to handle detainees during renditions and the use of interrogation techniques is very specific. Post-interrogation guidelines, which were the focus of this audit, address generally applicable and more familiar aspects of health care. OMS guidelines for the care of detainees in the post-interrogation phase require that periodic medical and psychological evaluations be performed and the results documented.

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[2] (U//~~FOUO~~) In April 2005, the President established the positions of Director and Deputy Director of National Intelligence, effectively eliminating the positions of DCI and DDCI, respectively. The Director, CIA and his deputy were thereafter known as DCIA and DDCIA, respectively. In October 2005, the DCIA announced that (b)(1) (b)(3) NatSecAct Directorate of Operations became part of the National Clandestine Service (NCS). The positions of ADDO and DDO thereafter became known as Deputy Director, NCS and Director, NCS, respectively.

[3] (~~TS~~/[redacted]NF) *Draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations.*

(b)(1) (b)(3) NatSecAct (~~TS~~/[redacted]NF) *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention.*

[5] (~~TS~~/[redacted]~~NF~~) Additional OMS guidance entitled *Part 2: Psychological and Psychiatric Support to Detainee Interrogations*, dated December 2003, remains in draft.

(b)(1)
(b)(3) NatSecAct

Absent any specific medical problems, bimonthly medical evaluations of detainees held at facilities under the direct control of the US Government are to be conducted and documented. Acute problems are to be addressed in a "clinically appropriate" timeframe.

(b)(1)
(b)(3) NatSecAct

~~(TS~~/[redacted] ~~NF~~) In addition to detecting and treating health problems, the OMS guidelines require medical officers to assess detainees for indications of inadequate nutrition. Detainees' weights are to be obtained and recorded at least monthly. In the event of a hunger strike by a detainee, medical officers are to evaluate the detainee for evidence of dehydration and starvation. The OMS guidelines authorize intervention on a hunger strike, with or without the detainee's consent, when necessary to preserve the life of the detainee. Forced fluid replacement may be undertaken when the medical officer has reason to believe that the refusal to take fluids poses a significant threat to the life or health of the detainee. The detainee must first be made aware of the risk associated with his behavior and refuse to resume oral hydration voluntarily. If the detainee is taking fluids but not nutrients, intervention must be undertaken when the detainee's weight falls below 90 percent of normal or the medical officer finds other evidence of physical deterioration suggesting risk to the detainee's life or health. Treatment is to be continued until the detainee is seen resuming voluntary eating and drinking.

(b)(1)
(b)(3) NatSecAct

~~(TS~~/[redacted] ~~NF~~) The guidelines note that it is important that detainee cells be kept clean and that there be provisions for regular bathing and oral hygiene. All detainees are to be monitored to insure they are actively involved in self-care. OMS arranges vision testing and the provision of appropriate corrective lenses for detainees. CTC/RDG arranges for a dentist to provide urgent dental care.

(b)(1)
(b)(3) NatSecAct

~~(TS~~/[redacted] ~~NF~~) To promote the long-term health of the detainee population, the OMS guidelines make recommendations on the use of vitamins and vaccines. If a detainee will not be exposed to sunlight for a sustained period, OMS recommends supplementing the detainee's diet with calcium and Vitamin D. OMS also offers and recommends the tetanus/diphtheria, MMR (mumps, measles and rubella), hepatitis B (combined with hepatitis A if possible), and influenza vaccines. The guidelines note that all detainees with hepatitis B or C should receive appropriate hepatitis immunizations to reduce the risk of additional liver damage.

(b)(1)
(b)(3) NatSecAct

~~(TS~~/[redacted] ~~NF~~) The OMS guidelines provide some information on handling violent detainees. OMS advocates a stepped approach that ranges from discussions with the detainee to the use of physical restraints and medication. The OMS guidelines stress that a decision to involuntarily administer medication to control a detainee's behavior should be a last resort. The guidelines prescribe that medical officers alone are authorized to make this determination and to administer medications to control a detainee's behavior. The guidelines provide that if medication is administered involuntarily, the medical officer is to remain at the facility until the detainee has recovered and a long-term treatment plan is developed. Specific guidelines on the use of medications intended to control detainee behavior, including information on specific substances and recommended dosages, are included in the OMS guidelines.

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted]/~~NF~~) In situations where a detainee's medical condition cannot be adequately treated at the detention facility, OMS guidelines recommend that detention facility staff and local CIA station personnel obtain through the host-country [redacted] a point of access to the host country's health care system. [redacted]

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted]/~~NF~~) The OMS guidelines reference a document prepared by OMS's [redacted] Division—*Psychological and Psychiatric Support to Detainee Interrogation*—for general guidance on how to deal with detainees' psychological problems. All detainees rendered to a CIA-controlled detention facility are to be given psychological evaluations on a "regular basis." If a CIA psychologist determines that a detainee has a diagnosable psychological disorder, a treatment plan will be developed in coordination with OMS and CTC/RDG.

(b)(3) CIAAct

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted]/~~NF~~) Mental health emergencies are specifically addressed in an appendix to the OMS guidelines. Contingency plans for handling mental health emergencies are to be developed for each CIA detention facility. A mental health emergency is defined as behavior that is a marked change from the detainee's usual behavior and may be agitated, impulsive, potentially harmful to self or others, or psychotic. In the event of a mental health emergency, the Senior Site Officer [redacted] (b)(3) CIAAct is directed to consult with the CIA psychologist at the facility or, if none is present, a psychologist assigned to CTC/RDG or OMS [redacted] (b)(3) CIAAct Division. [redacted] (b)(1) (b)(3) CIAAct (b)(3) NatSecAct A medical and psychological examination should be administered to the detainee at the earliest time possible. If a medical officer is present, he may use medication to sedate the detainee

(b)(1)
(b)(3) NatSecAct

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[6] (~~TS~~/[redacted]/~~NF~~) The COB at the detention facility is generally the "Senior Site Officer" [redacted] (b)(3) CIAAct

until the behavior abates and further evaluation can take place. The psychologist or medical officer will then manage the emergency until it has resolved and the detainee has been judged to be stable from a mental health/medical perspective.

(b)(1)
(b)(3) NatSecAct

~~(TS/~~[redacted]~~NF)~~ OMS also encourages medical officers in its guidelines to refer to outside sources on prison medical care. The guidelines specifically cite the US Department of Justice, Bureau of Prisons website, which outlines its clinical practice guidelines. Other references cited in the OMS guidelines include *Standards for Health Services in Prisons*, a regular publication of the National Commission on Correctional Health Care, and *Clinical Practice in Correctional Medicine* by Michael Puisis published in 1998.

6

~~TOP SECRET~~/ (b)(1) (b)(3) NatSecAct /~~NOFORN//MR~~

Exhibit E

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

~~TOP SECRET~~/ NOFORN//MR

Exhibit F

(U) Recommendations

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted] ~~NF~~) Recommendation 3 (significant): ***For the Chief of Medical Services in coordination with the Chief, CounterTerrorism Center, Renditions and Detainees Group:*** **Maintain hardcopy records at CIA-controlled detention facilities that contain critical information that may be needed by facility staff and medical personnel to safely and effectively respond to a medical emergency involving a detainee.**

(b)(1)
(b)(3) NatSecAct

(~~TS~~/[redacted] ~~NF~~) Recommendation 4 (significant): ***For the Chief, CounterTerrorism Center, Renditions and Detainees Group in coordination with the Chief of Medical Services:*** **(1) Provide training in safe food handling for personnel involved in the preparation of meals and handling of food at CIA-controlled detention facilities. (2) Develop and institute standards and procedures designed to avoid the introduction and transmission of food-borne illnesses at CIA-controlled detention facilities.**

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]
(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]
(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]
(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]
(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
(b)(5)

[redacted]
(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

Exhibit G

(U) Audit Team Members

(U//~~FOUO~~) This audit report was prepared by the Operations Division, Audit Staff, Office of Inspector General.

(b)(3) CIAAct
(b)(6)
[redacted]

Exhibit is Unclassified//~~FOUO~~
When Separated From Report

~~TOP SECRET//HCS//ORCON/NOFORN//MR~~

NOV - 9 2007

U.S. DISTRICT C
ALEXANDRIA, VIRG

U.S. Department of Justice
United States Attorney
Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314
(703)299-3700

October 25, 2007

FILED WITH THE
COURT SECURITY OFFICER
CSO: Macisso
DATE: 10/26/07

Hon. Karen J. Williams
Chief Judge
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Hon. Leonie M. Brinkema
United States District Judge
Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314-5799

Hand-delivered via Court Security Officer

Re: United States v. Zacarias Moussaoui
Fourth Circuit Docket Nos. 03-4792, 06-4494
District Court Case No. 01-455-A

Dear Chief Judge Williams and Judge Brinkema:

The Government respectfully submits this letter to inform the Court that two *ex parte* declarations previously submitted by the Central Intelligence Agency ("CIA") in this case contain factual errors concerning whether interrogations of certain enemy combatants were audio or video recorded. The errors, described more fully below, do not prejudice the defendant in light of his guilty plea, extensive admissions in the penalty phase, and the jury's decision not to impose a death sentence. We advise both Courts because the declarations in question were filed in the District Court and included in appendices filed in the Fourth Circuit.

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1-Human~~

~~TOP SECRET//HCS//ORCON/NOFORN//MR~~

Recently, we learned that the CIA obtained three recordings (two video tapes and one short audio tape) of interviews of [redacted] We are unaware of recordings involving the other enemy combatant witnesses at issue in this case [redacted] Further, the CIA came into possession of the three recordings under unique circumstances involving separate national security matters unrelated to the Moussaoui prosecution.

On September 13, 2007, an attorney for the CIA notified us of the discovery of a video tape of the interrogation of [redacted] On September 19, 2007, we viewed the video tape and a transcript [redacted] of the interview. The transcript contains no mention of Moussaoui or any details of the September 11 plot. In other words, the contents of the interrogation have no bearing on the Moussaoui prosecution.[2] The existence of the video tape, however, is at odds with statements in two CIA declarations submitted in this case, as discussed in detail below.

After learning of the existence of the first video tape, we requested the CIA to perform an exhaustive review to determine whether it was in possession of any other such recordings for any of the enemy combatant witnesses at issue in this case. CIA's review, which now appears to be complete, uncovered the existence of a second video tape, as well as a short audio tape, both of which pertained to interrogations [redacted] On October 18, 2007, we viewed the second video tape and listened to the audio tape, while reviewing transcripts

---

[1] [redacted] was one of the enemy combatant witnesses whom Moussaoui wanted to call to testify on his behalf; [redacted]

[2] The recording from [redacted]

[3] [redacted]

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1-Human~~

[redacted] Like the first video tape, the contents of the second video tape and the audio tape have no bearing on the Moussaoui prosecution — they neither mention Moussaoui nor discuss the September 11 plot. We attach for the Courts' review *ex parte* a copy of the transcripts for the three recordings.[5]

At our request, CIA also provided us with intelligence cables pertaining to the interviews recorded on the two video tapes. Because we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations. Based on our comparison of the cables to the [redacted] videotapes, and keeping in mind that the cables were prepared for the purposes of disseminating intelligence, we found that the intelligence cables accurately summarized the substance of the interrogations in question.

The fact that audio/video recording of enemy combatant interrogations occurred, and that the United States was in possession of three of those recordings is, as noted, inconsistent with factual assertions in CIA declarations dated May 9, 2003 (the "May 9 Declaration"), and November 14, 2005 (the "November 14 Declaration"). The May 9 Declaration arose after the Fourth Circuit directed the District Court to consider substitutions under the Classified Information Procedures Act ("CIPA") in lieu of enemy combatant testimony sought by the defendant. In an ensuing CIPA hearing, on May 7, 2003, Judge Brinkema ordered the Government to determine, *inter alia*, whether interrogations [redacted] were recorded. *See* 5/7/03 Tr. 11-13, 69. Two days later, the Government filed the May 9 Declaration, which was *ex parte* and accompanied by a motion under CIPA § 4 to make a limited disclosure to the defense of only the answers to the District Court's questions (but not the full explanations contained in the declaration). Judge Brinkema granted the § 4 motion, permitting the Government to make the following disclosure, among others, to the defense:

---

[4] The transcript of the audio tape previously existed and was contained within an intelligence cable.

[5] Although we have provided defense counsel with a copy of this letter, we have not provided them with a copy of the transcripts for two reasons. First, the interviews address other national security matters for which defense counsel lack a need to know. [redacted]

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1 Human~~

Question: Whether the interrogations [redacted] are being recorded in any format?

Answer: No.

See Docket No. 905 (Attachment A).[6]

The November 14 Declaration arose after the Fourth Circuit published its decision in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), and after Moussaoui pleaded guilty. Following these events, and in anticipation of the penalty-phase trial, the District Court ordered the Government to disclose various information [redacted] including whether interrogations were recorded. *See* 5/2/05 Order (Docket No. 1275). Judge Brinkema subsequently reconsidered most of that order, at the Government's request (*see* Docket No. 1282), but still directed the Government to "confirm or deny that it has video or audio tapes of these interrogations," *see* 11/3/05 Order (Docket No. 1359), at 4. The November 14 Declaration ensued, in which a CIA executive stated that the "U.S. Government does not have any video or audio tapes of the interrogations of [redacted]" *See* 11/14/05 Declaration (Docket No. 1369), at 3.

Unbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted. We asked the CIA to ascertain the reason for such an error. [redacted] As best as can be determined, it appears that the authors of the Declarations relied on assurances of the component of the CIA that [redacted] unknowing that a different component of the CIA had contact with [redacted]

As noted above, the errors in the CIA declarations at issue, although unfortunate, did not prejudice Moussaoui, who pled guilty, reiterated his guilt in substantial admissions in the penalty phase, and ultimately received a life sentence after the jury declined to sentence him to death.

---

[6] This response was cited by the District Court in an opinion, dated May 15, 2003. *See* Docket No. 925, at 9. Both the response and the May 15 opinion were included in the classified Supplemental Joint Appendix filed with the Fourth Circuit at the same time. *See* SC 249, 273. The May 9 Declaration was included in the classified Supplemental *Ex Parte* Appendix filed with the Fourth Circuit on May 23, 2003, in docket number 03-4162. *See* SGX, at 17-23.

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1-Human~~

We bring the errors to the Court's attention, however, as part of our obligation of candor to the Court.

The Government will promptly apprise the Court of any further developments.

Sincerely,

Chuck Rosenberg
United States Attorney

By:
David Novak
David Raskin
Assistant United States Attorneys

cc: Justin Antonipillai, Esq.
Barbara Hartung, Esq.
Appellate Counsel for Zacarias Moussaoui
(without transcripts)

~~Derived from: Multiple Sources~~
~~Declassify on: 25X1-Human~~

THE

CIA INTERROGATION

OF

ABU ZUBAYDAH

March 2001 - Jan. 2003

CIA Interrogation Techniques: Abu Zubayda.

~~(TS)~~ Abu Zubaydah: Terrorist Activities

- Abu Zubaydah was born a Palestinian and now holds Saudi citizenship. He was a senior lieutenant to Bin Ladin.
- At the time of his capture in Pakistan, he was heavily involved in al Qa'ida's operational planning, and had previously been an external liaison and logistics coordinator. [redacted]
- Taking him out of circulation has hurt al-Qa'ida operations in key nodes and helped disrupt a number of ongoing plots.

~~(S//NF)~~ Injuries at Time of Capture

- Abu Zubaydah was hit by two bullets during the arresting operation. [redacted] A second bullet caused a large wound in his leg.
- [redacted]
- Abu Zubaydah was provided adequate and appropriate medical care. [redacted]
- The medical treatment the Agency provided to Abu Zubaydah saved his life. He should now be considered healthy, other than some leg and knee pain.

~~(S//NF)~~ Highlights from Reporting by Abu Zubaydah

- Information from Abu Zubaydah—who was captured in late March—led to the capture of other operatives, and continues to provide some of our most valuable insights into the inner workings of al-Qa'ida. Over time, he has become more willing to cooperate on many issues, and his extensive familiarity with other al-Qa'ida terrorists and their methodologies daily helps us identify ways to exploit other detainees and to assess the credibility of reporting from a variety of sources.

- Abu Zubaydah identified Jose Padilla and Binyam Muhammad as al-Qa'ida operatives who had plans to detonate a uranium-topped "dirty bomb" in either Washington, DC, or New York City. Both have been captured. [redacted]

- In addition, Abu Zudbaydah indentified [redacted] senior al Qa'iada operator in [redacted] [redacted]

- [redacted]
-
- [redacted]

- As of mid-December 2002, Abu Zubaydah had been the source of over [redacted] disseminated counter-terrorism intelligence reports.

~~(TS)~~ [redacted]

-
-

[redacted]

~~(TS)~~ **Interrogation Techniques Used on Abu Zubaydah**

- The Agency used both routine and enhanced interrogation techniques against Abu Zubaydah.

- After consulting with the NSC and DOJ, CTC/[redacted] originally approved 24-48 hours of sleep deprivation.

In April 2002, CTC [redacted] learned that due to a misunderstanding that time frame had been exceeded.

- However, CTC [redacted] advised that since the process did not have adverse medical effects or result in hallucination (thereby disrupting profoundly Abu Zubaydah's senses or personality) it was within legal parameters.
- After first using routine interrogation techniques, the interrogation team concluded that Abu Zubaydah continued to withhold critical threat information, including the identities of al Qaida operatives in the US, that in order to elicit those identities the use of more aggressive techniques was required and that the use of those techniques would not engender lasting and severe mental or physical harm.
- Abu Zubaydah has employed a host of resistance techniques. He is the author of a seminal al Qaida manual on resistance to interrogation methods.
- The Agency sought and received Department of Justice approval for the following [redacted] enhanced techniques, [redacted] the waterboard.
- Specific interrogation team members may request prior approval from Headquarters to employ any or all of the enhanced techniques.
- Where a specific time period was allowed for a particular technique, a timekeeper was used to ensure that the techniques was only employed within the timeframes authorized.
- Agency employees engaged in the interrogation are complemented by expert personnel who possess extensive experience, gained within the Department of Defense, on the psychological and physical methods of interrogation (SERE) and the resistance techniques employed as countermeasures to such interrogation. These expert medical personnel were present throughout the interrogations.
- It is not and has never been the Agency's intent to permit Abu Zubaydah to die in the course of interrogation and appropriately trained medical

personnel have been on-site in the event an emergency medical situation arises.

- DOJ approval for use of the enhanced techniques in specific instances relies on our representation that those techniques, when applied by appropriately trained personnel, should not produce severe mental or physical pain or suffering.
- Indeed, DOJ concluded that the use of enhanced techniques carefully applied by appropriate personnel pursuant to prior Headquarters approval would not have the "specific intent" to inflict severe mental or physical pain or suffering, and therefore would not violate the law.
- For these reasons, we fully document in advance any decision to employ any enhanced techniques, along with the criteria that have been employed in making those decisions.
- The use of enhanced interrogation techniques proved productive; Abu Zubaydah provided additional useful information.
- Medical evaluations were conducted on Abu Zubaydah before and during the interrogations.. In addition, a psychological profile was conducted on him before the interrogations began.

~~(TS)~~ [redacted]

- [redacted]
- [redacted]
- [redacted]
  - [redacted]

[redacted]

  - [redacted]

- [redacted] **Videotapes.** In [redacted] 2002 an experienced OGC attorney [redacted] review interrogation videotapes of Abu Zubaydah and another detainee to confirm that the cable traffic accurately described the interrogation methods employed and that the methods conformed to the applicable legal and policy guidance.
  - [redacted] the OGC attorney, who had not previously been involved in this matter, reviewed the applicable legal and policy guidance governing the permissible interrogation methods and the cable traffic, and interviewed CTC and [redacted] personnel knowledgeable about the matter.
  - The attorney [redacted] inventoried the interrogation materials—videotapes, logbook, notebook, and psychologist's notes—[redacted] and reviewed the videotapes.
  - The attorney concluded that the cable traffic did in fact accurately describe the interrogation methods employed and that the methods conformed to the applicable legal and policy guidance.
  - After this review, the General Counsel advised the DCI that OGC had no objection to the destruction of the videotapes, but strongly recommended that the new leadership of the committees first be notified about the existence of the tapes and the reasons why the Agency has decided to destroy them.

- **Guidelines.** CTC [redacted] drafted "Guidelines on Interrogation Standards" and "Guidelines on Confinement Conditions for CIA Detainees". The guidelines are being coordinated. Once approved, all Agency personnel involved in interrogations or detentions will review these guidelines and acknowledge in writing that they have read and understand them.

- **Training.** CIA has established an interrogation program to train interrogators on techniques generally, enhanced techniques specifically, facilities, security, and the approval process.

- [redacted]
-

~~(TS)~~ [redacted]

- [redacted]
-
-

[redacted]

- ~~(S//NF)~~ Abu Zubaydah (AZ) was born a Palestinian and now holds Saudi citizenship.

- ~~(S//NF)~~ AZ was a senior lieutenant to UBL. At the time of his capture in Pakistan he was heavily involved in Al Qa'ida's operational planning, and had previously been an external liaison and logistics coordinator.

- ~~(S//NF)~~ AZ has corroborated intelligence on key Al Qa'ida planners and facilitators, and has provided information on Al Qa'ida's CBRN program and on individuals associated with that program. Information from AZ was instrumental in the capture near Chicago of Jose Padilla, a "dirty bomb" plotter, explosives expert, and terrorist trainer at Qandahar. AZ also identified [redacted] a senior Al Qa'ida operator in [redacted]

- ~~(S//NF)~~ AZ was hit by two bullets during the arresting operation. [redacted] AZ should be considered healthy, other than some leg and knee pain.

(~~TS~~//[redacted]//~~NF~~) Beginning in late April 2004, a number of media outlets published photographs of detainee abuse at the Department of Defense-run Abu Ghraib prison in Iraq. The media reports caused members of the Committee and individuals in the executive branch to focus on detainee issues. On May 12, 2004, the Committee held a lengthy hearing on detainee issues with Department of Defense and CIA witnesses. The CIA used the Abu Ghraib abuses as a contrasting reference point for its detention and interrogation activities. In a response to a question from a Committee member, CIA Deputy Director McLaughlin said, "we are not authorized in [the CIA program] to do anything like what you have seen in those photographs."[798]

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 960A (GOV)** **Government Notice** Of Proffer of Testimony for Dr. [redacted] 23 August 2024

1. Timeliness

This Notice is timely filed.

2. Notice

The Prosecution hereby notifies the Commission of the attached affidavit and curriculum vitae of Dr. [redacted] which was provided to the Defense on Monday, 19 August 2024. *See* Attachs. B–C. The affidavit provides a proffer of Dr. [redacted] expected testimony in rebuttal of Dr. David Hanrahan, a Defense expert witness. Dr. [redacted] is expected to testify from the Remote Hearing Room between 23–24 September 2024.

3. Attachments

A. Certificate of Service, dated 23 August 2024.

B. Affidavit of [redacted] Ph.D, dated 19 August 2024.

C. Curriculum Vitae of [redacted] Ph.D.

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Christopher M. Dykstra
Deputy Managing Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 23rd day of August 2024, I filed AE 960A (GOV), Government Notice Of Proffer of Testimony for Dr. [redacted] with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Christopher M. Dykstra
Deputy Managing Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
KHALID SHAIKH MOHAMMAD;	)	
WALID MUHAMMAD SALIH	)	
MUBARAK BIN 'ATTASH;	)	
RAMZI BINALSHIBH;	)	
ALI ABDUL AZIZ ALI;	)	
MUSTAFA AHMED ADAM AL	)	
HAWSAWI	)	19 August 2024

AFFIDAVIT OF [redacted] Ph.D.

[redacted]

[redacted]

[redacted]

7. Psychological testing involves the use of standardized questionnaires and self-report surveys that provide objective information about possible mental health diagnoses, personality structure, emotional states, and various psychological constructs and often, their severity. These data further inform an understanding of an individual's emotions, behavior, credibility of symptom report, interpersonal style and conflicts, vulnerabilities, strengths, and abnormalities.

8. Neuropsychological testing, which is performance- and task-oriented, assesses different domains of cognition and their relationship to brain integrity and function (e.g., brain – behavior relationships). Such testing is the gold standard of the behavioral sciences for the precise assessment of functional cognitive deficits (and strengths), and their neuroanatomical correlates attributable to neurological disease, developmental disorders, brain injury, and psychological disorders.

9. In the course of my career, I have evaluated a variety of litigants with reported histories of head injury and of emotional injury, in both criminal and civil litigation. My professional experience routinely integrates data from the medical record, historical antecedents, functional/everyday behaviors and subjective complaints of the examinee, the observations of collateral informants, assessment results of psychiatrists and other neuropsychologists, medical assessment from other physician colleagues, and neuroimaging evaluation from neuroradiologist colleagues. The responsibilities associated with such experiences include validity testing and accounting for the potential of malingering attendant to litigants, because of the secondary gain of the setting.

10. I have been retained by the United States government to consult with them on a variety of questions relating to the prosecution of Mr. Ali. There are issues raised in the reports, declarations, and testimony provided by the Ali defense team, particularly from Dr. Hanrahan, Dr. Shea, and Dr. Gur, which I have reviewed in detail.

11. Dr. Shea conducted psychological and neuropsychological testing and referenced it in his February 17, 2021 report, which I reviewed. In order to properly evaluate the results and impressions from Dr. Shea's neuropsychological report, I requested but did not receive the following:

a. A list of which tests were administered on which days, the order of the tests administered, and the approximate start and stop times for testing on each day.
b. Any notations of behavioral observations during testing, including any notes that indicate the amount of time that Mr. Ali required to complete any non-timed tests and questionnaires/self-report measures.
c. Notes, if any, regarding the amount of sleep that Mr. Ali had the night before each day of testing.
d. The sources of the normative data used by Dr. Shea in determining the standard scores or percentiles of each test administered (e.g., the test manual, research articles, compendia of neuropsychological tests, or other ancillary references) for the Nelson-Denny Reading Test (Form H) and Short Category Test Booklet Form (1987 Manual).

12. Based on the claims raised by the defense, additional personality and emotional/psychological testing would be needed in order to assess Mr. Ali's symptom report, its validity, severity, potential origin, behavioral effects, and all diagnostic considerations.

13. It appears that the defense experts did not objectively explore in depth certain domains of function such as personality and psychological/emotional variables, as well as symptom validity that would be helpful to better understand factors that could be influencing Mr. Ali's symptom presentation.

14. Specific symptom validity testing measures are critical to include in forensic evaluations as these procedures are designed to assess the veracity of a patient's self-report with empirically derived cutoffs used to rule out exaggeration, embellishment, and malingering of subjective symptoms.

15. Because all self-report questionnaires and surveys are vulnerable to malingered symptomatology, some tests have "built in" or embedded symptom validity safeguards to identify exaggerated or embellished self-report. However, all questionnaires and symptom checklists do not contain these types of protections and so they are particularly vulnerable to symptom fabrication that may not be obvious even to trained clinicians. The Clinician Administered PTSD Scale (CAPS) is one such measure that does not include any symptom validity safeguards that could verify the authenticity of a person's self-report of PTSD symptomatology. Consequently, as with all such questionnaires, it too is susceptible to exaggerated symptom report.

16. There are some "stand alone" symptom validity tests that are designed with the sole purpose of detecting symptom fabrication and exaggeration. These types of symptom validity tests do not provide any meaningful clinical information about an examinee other than the probability of malingered self-report. [redacted]

[redacted] Consequently, it is important to administer multiple SVTs in an examination in which there is substantial reliance on an examinee's self-report rather than other, more objective data, and in which there is an incentive for a subject to embellish or fabricate symptoms.

17. A change in one's mental state at the time of injury or immediately thereafter is necessary to conclude that a person has sustained a brain injury. Just striking one's head does not constitute brain trauma or injury.

18. The length of unconsciousness, disorientation/confusion, loss of memory or rapid forgetfulness, and duration of said symptoms, need to be evident at the time of or immediately post-injury to determine the existence and severity of a traumatic brain injury.

19. [redacted]

20. [redacted]

21. Dr. Hanrahan asserted that during a 'walling' interrogation, Mr. Ali suffered "repetitive traumatic brain injuries…with insufficient recovery between injuries and in many cases milliseconds elapsing between injuries." However, this claim cannot be known with reasonable certainty. For example, it is unknown if Mr. Ali struck his head during the interrogation and if he did, how many times it occurred or what evidence there was that each strike resulted in a concussion. Importantly, a head strike does not mean that the brain was concussed. The presumption that he sustained a brain injury multiple times is unverifiable.

22. If a concussion is suffered, physical symptoms (such as headaches and dizziness) are ordinarily immediately apparent in the aftermath.

23. [redacted]

24. Absent the emergence post-injury of another or additional neurologic conditions, the expected trajectory of one's symptomatology following a brain injury would generally reflect improvement or plateau, but not a worsening of neurologic symptoms over time. [redacted]

25. Only when there are clusters of cognitive impairments, consistent with other historical, medical, behavioral, and functional records closer in time to an event, reflecting a convergence of the evidence, can a doctor be confident that a brain problem relates to a particular injury.

26. [redacted]

27. Having a previous brain injury does not necessarily equate to permanent brain damage or long-term disability.

28. A neuropsychological examination that takes place years after the purportedly injurious event may have very little forensic value. It would be highly improbable that neuropsychological testing could link one's neurocognitive strengths or weaknesses to any injury that purportedly took place nearly seventeen years before, in the absence of unequivocal significant brain trauma, well established premorbid abilities, and baseline and serial neuropsychological testing conducted over time.

29. [redacted]

30. [redacted]

31. [redacted]

32. It is common for neuro-healthy adults to exhibit significant variability between the highest and lowest scores within their own neuropsychological profiles, and that becomes more prevalent with the more tests you administer. Thus, abnormally low scores occur frequently within a neurologically normal population and thus cannot be interpreted as evidence of impairment without multiple low scores that cluster within the same cognitive domain.

33. [redacted]

[redacted]

34. A brain image is not a behavioral or cognitive test that can directly predict executive functioning or any other cognitive ability. At most, some functional imaging may raise a suspicion of neuropsychological dysfunction, but does not prove that a functional ability is impaired.

35. It is misleading to apply MRI imaging to predict specific cognitive abilities as Dr. Gur attempts to do. [redacted]

36. [redacted]

37. [redacted]

38. [redacted]

39. [redacted]

40. [redacted]

41. [redacted]

[redacted]

FURTHER AFFIANT SAYETH NAUGHT

[redacted]

____

[redacted] Ph.D.

ATTACHMENT C

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I. INTRODUCTION

When Attorney General Mukasey and Deputy Attorney General Mark Filip were given access to the Office of Professional Responsibility's (OPR) Draft Report in the waning hours of the Bush Administration, they concluded that it represented an "unprecedented" exercise of disciplinary authority based on "unsupported speculation," legal analysis by "commentators and scholars with unstated potential biases," and a "misunderstanding" of important "Department of Justice and Executive Branch interagency practices." Letter from Michael B. Mukasey & Mark Filip to H. Marshall Jarrett at 2-3 (Jan. 19, 2009). They urged OPR to reverse course because there was "[no] reason to believe that these OLC lawyers were acting in anything but good faith" at a time when the nation was confronted with "the express threat of further [terrorist] attacks and murders" *Id.* at 14. They warned OPR that the use of its disciplinary powers to find misconduct in these circumstances would be "likely to have harmful consequences not only for those immediately involved, but also for the Department and ultimately for the country." *Id.* OPR forged ahead and has now issued a Final Report that is based on all the same flaws and that poses all the same dangers. It is, indeed, "unprecedented" and unprincipled.

Critics of the interrogation policies have long speculated that OPR had uncovered damning facts that would reveal a conspiracy between the White House and OLC to provide sham advice to justify interrogation techniques that plainly constituted "torture" under 18 U.S.C. §§ 2340, 2340A ("the Act"). The Report confirms, however, that OPR found nothing of the kind. Even though OPR intends to "notify bar counsel in the states where ... Bybee [is] licensed" that he acted "in reckless disregard" of his ethical duties by issuing the Bybee Memos[1] on August 1, 2002 (Report at 260), OPR does not actually dispute the facts that prove just the opposite:

- Judge Bybee acted in good faith, honestly believed the advice he gave, did not know that the memos were "incomplete or one-sided" and "did not commit intentional professional misconduct." Report at 256.
- Judge Bybee, as the Assistant Attorney General for OLC, "should not be held responsible for the accuracy and completeness of every ... argument" in these memos, which were researched and drafted by other OLC attorneys with established "expert[ise] in presidential war powers." Report at 255, 256.
- The memos were reviewed by a dozen or more Executive branch lawyers, including Attorney General Ashcroft, Deputy Attorney General Larry Thompson, Assistant Attorney General Michael Chertoff, and Legal Adviser to the National Security Council, John Bellinger, and *no one ever* told Judge Bybee not to issue the opinions. *See* Attachment 19.

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[1] We refer to the Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A* (Aug. 1, 2002) as the "Bybee Memo." Similarly, we refer to the previously classified Memorandum from Jay S. Bybee for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002) as the "Classified Bybee Memo."

- Other AAGs who succeeded Judge Bybee at OLC also determined that the CIA's proposed techniques, including waterboarding, did not violate the Act. *See id.*

- Judge Bybee's period for reviewing the draft memos was truncated because he was informed that the CIA had to have the signed advice by August 1, 2002 in order to proceed with an urgent interrogation of a high ranking member of al Qaeda believed to have information critical to the prevention of a threatened second wave of attacks. *See infra* Section II.C.

- The client representative of the CIA understood that "the issues were uncertain and that there were no controlling precedents" and did not request "an exhaustive memorandum that thoroughly discussed all possible counter arguments." Rather, he was seeking "OLC's best judgment about the correct answer to a difficult question of law" so that it "could proceed with a vital interrogation, using lawful methods, as soon as possible." Letter from Maureen Mahoney to John Rizzo (Oct. 5, 2009) ¶ 1. ("Rizzo Letter").

- The central elements of the statutory interpretation advanced in the Bybee Memos have been adopted by the D.C. Circuit and the Third Circuit in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) and *Pierre v. Attorney General*, 528 F.3d 180 (3d Cir. 2008), and OPR did not even attempt to find that "the Bybee ... Memos [did not] arrive[] at a correct result." Report at 160.

Based on these uncontested facts, any fair adjudicator familiar with the law of ethics would conclude that, right or wrong, Judge Bybee did not violate his duties of competence, independence, or candor, as those disciplinary rules have always been understood. OPR nonetheless seems to rest its finding of misconduct on a violation of D.C. Rule 2.1, although it never expressly says so. Report at 21-23, 255-57. As one of the foremost ethics experts in the nation has confirmed, however, the duty of candor requires a lawyer to give his "honest assessment" and Judge Bybee had no duty to "advert[] to counter-arguments that might have been conjectured." Letter from Geoffrey C. Hazard, Jr. to Maureen E. Mahoney ¶ 13 (Oct. 7, 2009) ("Hazard Letter"). Professor Hazard instead concluded that the Bybee Memos are "extensive, detailed, careful and sober," and that there is "no basis for charging Judge Bybee with failure to conform to recognized standards of professional conduct." *Id.* at ¶¶ 4, 18. And even though OPR trumpets latter day criticisms of certain features of the memos by other Executive Branch officials, it conveniently fails to tell its readers that every one of them has emphatically stated that they do not believe that perceived deficiencies fell below the standard of care. As Jack Goldsmith told OPR in no uncertain terms, "he never believed ... that the analysis in these opinions implicated any professional misconduct." Memorandum for David Margolis from Jack Goldsmith, *Re: OPR Report on OLC Lawyers* 4 n.7 (June 5, 2009) ("Goldsmith Submission").

Confronted with these settled disciplinary standards, OPR just invents new ones. It ignores the express definition of "candor" in the comments to Rule 2.1—counsel's "honest assessment"—and replaces it with a duty to provide a "thorough" and "objective" recitation of "any counter arguments." Report at 24, 256. It does not cite a single Rule 2.1 decision from any jurisdiction to support its version of the duty and instead relies exclusively on two research and writing treatises and "aspirational" OLC guidelines that were written years after the Bybee Memos were issued. *Id.* at 24. Nor does OPR bother to explain how this guideline could reflect an "unambiguous" duty not to prepare "incomplete ... one-sided" opinions (Report at 256), as required by OPR's own standards,[2] when OLC's files are literally overflowing with short opinions that fail to address "counter arguments." As Professor Hazard notes, the shortest OLC opinion appears to be 28 words, and one of Judge Bybee's successors authorized the CIA to use waterboarding in a two-page letter that said analysis would follow "at a later date." Hazard Letter at ¶¶ 11, 12; Letter for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Daniel B. Levin 1 (Aug. 6, 2004). OPR avoids this rather obvious impediment to its theory by failing to cite a *single* OLC opinion issued prior to the Bybee Memos.

OPR then proceeds to engage in a form of analysis that is unheard of in the annals of disciplinary proceedings. It spends nearly 100 pages scrutinizing the wording of the memos and the supporting authorities on a line-by-line basis hunting for "errors, omissions, misstatements, and illogical conclusions" in the analysis. Report at 159. This so-called "analytical approach" (Report at 24) is undoubtedly foreclosed everywhere because OPR never cites a single opinion finding a disciplinary violation at any point in its 261 pages of analysis. But more importantly, this approach is expressly forbidden by the rules in D.C., which OPR purports to apply. OPR accordingly ignores the fact that the D.C. Board on Professional Responsibility, in an opinion affirmed by the D.C. Court of Appeals, squarely held that the central focus of a disciplinary inquiry must be the lawyers' "[]attention" to the matter—and not the quality of the analysis—because disciplinary authorities must not "put [themselves] in the position of a sort of court of appeals from lawyers' judgments" and engage in "the worst sort of second-guessing or Monday morning quarterbacking." *In re Stanton,* 479 A.2d 281, 287 (1983). Yet OPR rests on almost 100 pages of "second-guessing" for virtually every professional judgment that was made in the preparation of these memos.

While conducting that analysis, OPR purported to find that the "flaws consistently favored a permissive view of the torture statute." Report at 159. Yet most of the "flaws" OPR identifies weren't "flaws" at all. They are either the product of OPR's poor understanding of the law or issues that are open for genuine debate. But no matter. The most telling feature of OPR's hunt for flaws is its failure to discuss the implications of the D.C. Circuit's decision in *Price* at any point in its Report. One month before the Bybee memos were completed, the D.C. Circuit adopted a definition of "torture" under an analogous statute that vindicates Judge Bybee's analysis. To this day, *Price* is the leading decision on the definition of "severe pain" as it pertains to the statutory definition of "torture," and held that Congress adopted a rigorous definition of "torture" that used "agony" as a benchmark. 294 F.3d at 93. That definition is arguably more restrictive than the one adopted in the Bybee Memos. So OPR *never cites it a single time anywhere in the report*. Then there is the matter of the Third Circuit's *en banc* decision in *Pierre*, where a ten-judge majority adopted the memos' analysis of the specific intent element for proof of torture. 528 F.3d at 187. OPR's response to *Pierre*? A footnote explaining that it doesn't count because "it was decided after the issuance" of the Bybee Memos. Report at 175 n.132. Under OPR's approach, OLC lawyers can accurately predict the outcome of future litigation in U.S. courts but be referred to the D.C. Bar for misconduct because they did not recite all the arguments that the losing parties would make in their briefs. That is exactly what is happening here.

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[2] *See* U.S. Dep't of Justice, Office of Prof'l Responsibility, *Analytical Framework* ¶ B(3) (2005) ("OPR Analytical Framework"),

And then there is OPR's finding of recklessness. OPR does not cite a single recklessness case from any jurisdiction. Not one. As Judge Bybee informed OPR in response to its draft, the Supreme Court recently held that the adoption of a plausible but erroneous interpretation of an unsettled question of law could not be reckless as a matter of law. *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007). OPR's response? It is a single footnote claiming that the standards established in *Safeco* are irrelevant because the statute at issue there "requires willfulness to establish civil liability" while OPR's standards only require "recklessness." Report at 19 n.19. Here is what the Supreme Court actually held: "[R]eckless action is covered" by the civil liability provision at issue because "the standard civil usage" of "willful" means "reckless." 551 U.S. at 52, 57. The Court's entire analysis of the conduct at issue there, *i.e.* adoption of an erroneous interpretation of the law, was assessed solely with reference to "the common law understanding" of the concept of "recklessness." *Id.* at 69. Sanctions for OPR counsel anyone?

So much for duties against "one-sided" presentations. But perhaps OPR thinks these new duties only apply to former officials of an Administration that adopted policies "many would argue violated the torture statute" (Report at 251)—even if they don't. The pervasive theme in the OPR report is that if you criticize the Bybee memo you're right and worthy of consideration, and if you support the memo you're biased and to be ignored. Nothing shows that perspective more clearly than OPR's repeated reliance on successors' select criticisms of the memos (*e.g.*, Report at 159-160), while dismissing their widespread agreement with the memos' conclusions as "not relevant to [their] analysis." Report at 160.

As a matter of policy, OPR's analysis, if adopted, will prove to be a cancer within the Justice Department. Advice on the most difficult legal questions of our time will become watered down, equivocal, queasy, and useless. Dissent and debate—because they become after-the-fact evidence of recklessness—will be discouraged. Supervisors will be unable to rely on the work or advice of the very attorneys they must rely upon. And Department officials will be understandably paralyzed by the fear that the next Administration will disagree.

Outside the Department of Justice the consequences will be worse. The OPR report and everyone who participated in it will be subjected to the same scrutiny applied to Judge Bybee and the same legal standard it purports to adopt. Ethics charges and bar complaints will become the licensed currency of political disagreements. And while the Department of Justice can push this snowball down the hill, its size, speed, direction, and ultimate stopping place will be beyond the control of the Department or anyone in the Executive Branch.

The country does not want or need a debate in which the question is whether the Office of Legal Counsel in the prior administration or the Office of Professional Responsibility in the current one acted improperly, with partisan bias, and political objectives. Respectfully, the time to stop this process is now.

II. THE UNDISPUTED FACTS ESTABLISH THAT JUDGE BYBEE PROVIDED GOOD FAITH ANSWERS TO UNSETTLED QUESTIONS OF LAW AT A TIME OF NATIONAL CRISIS

A. Judge Bybee Acted In Good Faith

OPR concedes that Judge Bybee acted in good faith. The Report states unequivocally that OPR "found insufficient evidence to conclude that Bybee knew at the time that the advice in question was incomplete or one-sided." Report at 256. OPR nevertheless fails to recite most of the evidence demonstrating that Judge Bybee made a good faith effort to satisfy his ethical obligations and issued an opinion that reflected his honest assessment of the legal issues presented. We accordingly summarize those facts here.

First, the individuals with personal knowledge of the relevant events have uniformly confirmed that Judge Bybee believed the advice he gave and signed the Bybee Memos in good faith.[3] Three attorneys within OLC and one attorney in the Office of the Attorney General worked directly with Judge Bybee on the preparation of the Bybee Memos. As we previously informed OPR (Bybee Draft Response[4] at 7), all of these lawyers authorized us to represent that they believe that Judge Bybee performed his duties in good faith and that the memos reflected his honest assessment of the law.

One of the two Deputies assigned to the matter, Patrick Philbin, [redacted] told OPR that it would be "unjust" to accuse Judge Bybee (or John Yoo) of an intent to "provide ... immunity to CIA operatives." [redacted]). To the contrary, Philbin emphasized that "[i]n all the interactions" he had with Judge Bybee, "the clear understanding" was that the Classified Bybee Memo served to "plac[e] narrowly defined limits on the practices" and "[t]here was never any discussion or any suggestion in Mr. Philbin's presence that [other] sections of the Bybee Memo were intended to have (or could be read to have) any effect of providing an immunity." [redacted] The other deputy, John Yoo, similarly testified before Congress that everyone at OLC, including Judge Bybee, was determined to interpret the law, in good faith, "as best we could with the materials that we had available under the circumstances." *From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary* ("DOJ Hearing"), 110th Cong. 8-9 (2008) (testimony of John C. Yoo).

Other officials who were involved in 2002 have echoed that assessment of the facts based upon their personal knowledge. Timothy Flanigan, Deputy White House Counsel at the time, stated in a declaration submitted to OPR that he has "no doubt that Judge Bybee, Professor Yoo, Attorney General Ashcroft and the other senior DOJ attorneys who reviewed and contributed to [the Bybee Memo] intended only to provide an honest, good faith assessment of these very difficult and challenging questions of law." Declaration of Timothy E. Flanigan ¶ 3 (May 2, 2009) ("Flanigan Decl.") (Appendix 2). John Rizzo, Acting General Counsel to the CIA, said that he "never doubted that the [Bybee Memos'] conclusions reflected Jay Bybee's and John Yoo's honest assessment of the legal issues they addressed." Letter from Maureen Mahoney to John Rizzo ¶ 2 (Oct. 5, 2009) ("Rizzo Letter") (Appendix 1). And Michael Chertoff, the Assistant Attorney General for the Criminal Division, also authorized Judge Bybee to represent that he had no information to suggest that Judge Bybee acted with anything other than good faith.

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[3] Judge Bybee himself has affirmed that everyone who worked on the memos gave their "'best, honest advice, based on our good-faith analysis of the law.'" Neil A. Lewis, *Official Defends Signing Interrogation Memos*, N.Y. Times, Apr. 28, 2009 (quoting Judge Bybee).

[4] We refer to Judge Bybee's May 2009 response to OPR's Draft Report as the "Bybee Draft Response."

Judge Bybee's successors as head of OLC, some of whom were critical of portions of the memos, also concurred in this assessment. Jack Goldsmith, who succeeded Judge Bybee, became very familiar with the events at issue and has publicly reported his conclusion that the memos were written "in good faith." Jack L. Goldsmith, *The Terror Presidency: Law And Judgment Inside The Bush Administration* 167 (2007) ("Goldsmith, *The Terror Presidency*"). Moreover, Goldsmith felt strongly enough to submit his own unsolicited memorandum to DOJ. Goldsmith informed OPR that "I am confident, based on what I know, that Jay Bybee acted in good faith (i.e. did not think he was violating the law) and satisfied his professional responsibilities." Memorandum for David Margolis from Jack Goldsmith, *Re: OPR Report on OLC Lawyers* 4 n.7 (June 5, 2009) ("Goldsmith Submission"). OPR reports none of this in its recitation of the facts.[5] Daniel Levin, who followed Goldsmith, submitted a declaration for OPR confirming that, "[i]n [his] view, the authors believed what they wrote," and specifically clarified that he never intended any criticism of the Bybee Memo to suggest that Judge Bybee committed professional misconduct in signing the opinion. Declaration of Daniel Levin ¶¶ 6-7 (Apr. 29, 2009) ("Levin Decl.") (Appendix 3). Finally, Steven Bradbury, who issued two memoranda that withdrew several OLC opinions from early in the Bush administration, stated that "[n]either memorandum is intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility." Memorandum for the Files from Steven G. Bradbury, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* 1 n.1 (Jan. 15, 2009) ("Bradbury 2009 Memo").

In addition, all three of the Attorneys General who served in the Bush Administration have expressed their view that the OLC attorneys acted in good faith when issuing these opinions. Attorney General Mukasey and Deputy Attorney General Filip reached this conclusion after reviewing OPR's Draft Report and discussing the investigation with OPR. *See* Letter from Michael B. Mukasey & Mark Filip to H. Marshall Jarrett (Jan. 19, 2009) ("Mukasey Letter"). The Mukasey Letter (at 10) explains: "After reviewing relevant documents from this time period and interviewing all the attorneys involved in requesting and providing the advice, OPR found no direct evidence that the opinions in question reflected anything other than Mr. Bybee's or Mr. Yoo's best legal judgment at the time—a fact that OPR confirmed in our recent meeting, but that the Draft Report does not once mention….Absent any evidence to disbelieve the testimony of Mr. Bybee and Mr. Yoo, we respectfully submit that the speculation currently contained in the Draft Report is insufficient to support a finding that these attorneys were not acting in good faith or rendering their best independent assessment of the law in providing the advice contained in these opinions." *See also* Transcript of Reporters Roundtable Discussion With Attorney General Michael B. Mukasey (Dec. 3, 2008) ("Roundtable with Attorney General Mukasey") ("[T]here is absolutely no evidence that anybody who rendered a legal opinion ... with respect to interrogation policies, did so for any reason other than to protect the security in the country and in the belief that he or she was doing something lawful.").[6]

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[5] Without citing anything else from his submission, OPR acknowledges in a footnote of its legal analysis that Goldsmith "never believed that the analysis in the opinions 'implicated any professional misconduct.'" Report at 197 n.151 (citing Goldsmith Submission at 1).

When Attorney General Gonzales testified before Congress, he also conveyed his conclusion that "the people at the Office of Legal Counsel were simply doing their best to interpret a statute drafted by Congress." *Confirmation Hearing on the Nomination of Alberto Gonzales to be Attorney General of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 133 (2005) (statement of Alberto Gonzales). Attorney General Ashcroft likewise testified before Congress that "[t]he conclusions of all the memos were, I believe, accurate conclusions." DOJ Hearing, Part V at 41 (June 18, 2008) (statement of John Ashcroft). Ashcroft recently reiterated that the memos reached the "right conclusion" and noted that as Attorney General he relied on the "best judgments of the lawyers in the department." Dan Abrams, *Bush's Lawyers Strike Back*, Daily Beast, May 3, 2009.

Second, while all of these opinions are more than sufficient to corroborate Judge Bybee's good faith, the facts also demonstrate that OLC did not serve as a rubber stamp for the CIA. *See* Rizzo Letter ¶ 2 (confirming that OLC "did not simply 'rubber stamp' everything the CIA was considering"). [redacted] *Id.* In fact, OPR's own report reveals a series of exchanges where OLC required more due diligence for its legal advice. For example, [redacted]

Perhaps most telling, OLC's resistance to one proposed technique led the CIA to drop it from the interrogation plan. *See* Central Intelligence Agency Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)* ¶ 35 (May 7, 2004) ("CIA IG Report"). [redacted]

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[6] *Available at* http://www.reuters.com/article/pressRelease/idUS250091+03-Dec-2008+PRN20081203.

[redacted]

Third, there is absolutely nothing about Judge Bybee's background or his relationship with the White House that would support an inference of bad faith. Judge Bybee's career reflects a long-time commitment to public service, including two years in DOJ's Office of Legal Policy, three years on the Department's Appellate Staff at the Civil Division, and another two as Associate Counsel to President George H.W. Bush. When Judge Bybee returned to government service as head of OLC in October 2001, after ten years as a law professor, he devoted himself to his job, issuing numerous opinions ranging in topics from the proper role of legal guardians in naturalization proceedings (March 13, 2002) to the delegation authority of the chemical safety and hazard investigation board (April 19, 2002). By all accounts, Judge Bybee fulfilled his responsibilities as head of OLC with dedication and distinction. Although OPR cites (speculative) accusations that Bradbury may have felt pressure from the White House in order to secure the nomination to serve as AAG of OLC (Report at 145), no similar allegations were leveled against Judge Bybee. He never served in an "acting" capacity and his nomination to the Ninth Circuit occurred on May 22, 2002, well before he even began work on the memos at issue. During the drafting process, while Judge Bybee acknowledged that he knew the White House was "anxious to … wrap it up," he affirmed that he had never felt "any pressure on the memo from anyone in the department in terms of how it would come out and how it was written." Transcript of Confidential Deposition of Judge Jay S. Bybee at 46, 24-25 (Dec. 9, 2005) ("Bybee Tr."). Judge Bybee was ready and willing to issue advice that was unwelcome when his honest assessment of the law led to that conclusion. Nothing indicates that Judge Bybee acted otherwise on this occasion. He has continued to serve his country with distinction during his tenure on the Ninth Circuit. As OPR concedes, there is no evidence of anything but good faith on Judge Bybee's part.

B. Judge Bybee Had No Reason to Question the Memos' Candor or Competence

OPR acknowledges "that an Assistant Attorney General should not be held responsible for checking the accuracy and completeness of every citation, case summary, or argument in every legal memorandum submitted for his signature by a Deputy AAG." Report at 255. OPR nevertheless determines that Judge Bybee issued the opinion recklessly because he "should have known" that the memoranda did not meet minimum ethical standards. *Id.* at 256. The undisputed facts refute any such inference. The opinions reflect the work product of highly trained lawyers who devoted hundreds of hours to the preparation of a detailed analysis on unsettled questions of law. Nothing that occurred during the review process put Judge Bybee on notice that issuance of the opinion might violate ethical standards.

First, Bybee had reason to be confident in the analysis prepared by his office because OLC adhered to its customary procedures for the preparation of a highly classified opinion. Three exceptionally talented members of Judge Bybee's office (all former or future Supreme Court law clerks) were assigned to work on the response to the CIA: [redacted] John Yoo, the lead deputy who was "the resident expert in the OLC on foreign policy and national security issues"; and Patrick Philbin, who also had substantial experience in this field and served as the "second Deputy." *Id.* at 26, 39. Significantly, these OLC attorneys worked on the memos for over three months before Judge Bybee ever reviewed a draft. The effort expended was commensurate with the importance of the project.

During April 2002, Yoo and [redacted] worked on multiple drafts and revisions of the memorandum before circulating an initial draft for comment on July 8, 2002. *Id.* at 43 & n.48. Yoo and [redacted] produced two more drafts in the following days and scheduled numerous meetings between July 12 and July 19 to discuss the issues with officials at DOJ, the White House, the NSC, and the CIA. *Id.* at 45, 46, 50, 52. Around this time, Philbin—the Second Deputy—began his review of the draft as well. Emails show Yoo and [redacted] referring to comments from Philbin as early as July 16, 2002, well before they delivered a draft to Judge Bybee for review. (There is no dispute that it is customary for the AAG to receive drafts near the end of the review process.[7]) Philbin continued to play an active role in the latter stages of the drafting process, providing "a lot of input" on the Commander-in-Chief section in particular.[8] *Id.* at 50.

Second, Judge Bybee was fully attentive to his supervisory responsibilities. He recognized the seriousness of the questions presented and met with Attorney General Ashcroft for the purpose of discussing the issue. *Id.* at 49 n.52. He also fully utilized the limited time available to him to review the draft memoranda. Although OPR estimates that Judge Bybee had "an approximately two-week period" for review (*id.* at 256), the first evidence of Judge Bybee's involvement in the drafting process was on July 26, 2002. This was only one week before the eventual deadline and the same day that the White House informed OLC that the memos had to be completed "as soon as possible." *Id.* at 57. Despite the need to circumscribe the period for Judge Bybee's review of the drafts, there is no dispute that he adjusted his schedule so that he could become "very involved" and "went through multiple drafts" of the memos. *Id.* at 59. Judge Bybee also had several meetings with Yoo, [redacted] and Philbin during this time period. Bybee Tr. at 32.

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[7] Memorandum from Steven Bradbury, Principal Deputy Assistant Attorney General, for Attorneys of the Office, *Re: Best Practices for OLC Opinions* 3 (May 16, 2005) ("Best Practices Memo") (an opinion is ordinarily not circulated "for final review by the AAG" until after the second Deputy read is complete).

[8] It is very difficult for DOJ officials to recall their precise role in the events that occurred seven years ago. The email evidence indicates, however, that Philbin did not actually "step out until the end." Report at 59. He provided comments on numerous drafts throughout the last two weeks in July. *See* Email from [redacted] to John Yoo (July 16, 2002) ("Also, do you have a couple minutes to discuss some of Pat's comments?"); Report at 53 [redacted] also sent Yoo a new draft, dated July 23, 2002, noting in her email that she had incorporated the cite check, new material on specific intent, and Philbin's comments."); Report at 57 ("In a July 26, 2002 email, Yoo asked [redacted] to 'stop by and pick up [Philbin's] comments and input them.... You also have Mike Chertoff's comments, to input.' Two days later, on July 28, 2002, Yoo sent [redacted] a new draft that he stated included 'the Philbin, Gonzales and Chertoff comments.'"); Email from [redacted] to Philbin (July 31, 2002) (seeking additional comments, and Philbin responding that he would provide some "in a few minutes"); Email from Philbin to [redacted] (July 31, 2002) ("[A]lso, if you have a new draft of the other memo that I should look at, I can do that whenever."); Email from Philbin to [redacted] (Aug. 1, 2002) ("I stopped by, but you had stepped out for a minute. Please swing by my office when you have a chance—I have a couple questions I'd like to talk about."); Email from [redacted] to Yoo (Aug. 1, 2002) ("I have incorporated Jay's edits and most of Pat's edits (some of his comments require a little legwork). Jay is reading what's been entered so far right now. I'm editing the second memo based on Jay's comments and comments from the agency. I'll bring you a copy of the draft Jay is reading if you like.").

While OPR seeks to marginalize Judge Bybee's contributions by characterizing his comments on a single draft as "all minor" (Report at 60 & n.60), this assessment is based on a record lacking much of the relevant documentary evidence, including most of Yoo's and Philbin's emails. *Id.* at 5 n.3. In addition, available email correspondence between Yoo and [redacted] confirms that Judge Bybee provided comprehensive line edits and structural suggestions to improve the memos—most of which [redacted] and Yoo incorporated into the drafts.[9] *Id.* at 59. By July 31, 2002, the time constraints increased dramatically when the White House informed OLC that both memos had to be completed and signed by the next day for exigent reasons discussed in Section II.C, *infra.*[10] *Id.* at 61. Judge Bybee worked on the issues intensively in the remaining time. He reviewed multiple drafts on August 1, 2002 and signed the opinion late in the evening after a meeting with [redacted] Yoo, Philbin, and Adam Ciongoli, Counselor to the Attorney General. *Id.* at 60 n.60, 62.

Judge Bybee properly used the limited time available to review the memos for logical consistency and relied on his highly-trained staff to analyze the governing precedents and conduct original research. As head of OLC, Judge Bybee had managerial responsibility over an office with more than twenty experienced attorneys who generated opinions at a daunting pace, including nineteen publicly released in 2002. Combined with the intense pressures of the national security environment in early 2002, delegation was an essential feature of Judge Bybee's position. As former Attorney General John Ashcroft, who held ultimate responsibility for the OLC memos, explained, "scores of critically important matters came to my desk" and by necessity "I daily relied on expert counsel and painstaking work of experienced and skilled professionals who staffed the Department." DOJ Hearing, Part V, at 5 (June 18, 2008) (statement of John Ashcroft). Judge Bybee also properly relied on his dedicated staff and did not discover any of the alleged deficiencies in research and case analysis that OPR (unfairly) attributes to OLC. Instead, as OPR acknowledges (Report at 256), Judge Bybee's review of the memos did not cause him to doubt that they were competent and candid.

Third, Judge Bybee had no objective basis to conclude that the memos were not competent or candid. OPR's contrary conclusion proceeds from the inappropriate premise that Judge Bybee should have found the conclusions surprising based on norms condemning torture. *See, e.g.*, Report at 256-57. Yet OPR seems to forget that Congress adopted a narrow definition of torture that excluded many forms of cruel, inhuman, and degrading treatment. The core question was whether the techniques at issue satisfied that statutory definition. Nor does OPR recognize that the Supreme Court has firmly established that U.S. law does afford immunity to acts of outright torture in various settings. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993) (holding Saudi government immune in action alleging personal injury resulting from

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[9] *See, e.g.*, Email from [redacted] to Judge Bybee (July 31, 2002) ("I have a couple of questions regarding your edits. It's not entirely clear to me where to move things in the avoidance of constitutional problems section. Let me know when you have a couple of minutes."); Email from [redacted] to Yoo (July 31, 2002) ("I have some more edits from Jay that require explanation/discussion.").

[10] It is a gross misrepresentation of the record for OPR to suggest that the OLC attorneys felt no time pressure leading up to this deadline. Report at 226 n.185 ('We note that none of the attorneys involved in drafting the Bybee and Yoo Memos asserted that they did not have sufficient time to complete the memoranda or that time pressures affected the quality of their work."). OPR itself quoted Philbin's discussion of the "situation and the *time pressures*" on the final night (*id.* at 63), and Judge Bybee answered "yes" when OPR asked him whether anyone communicated any urgency in terms of getting the memos done. Bybee Tr. at 45-46.

"unlawful detention and torture"). Invoking "jus cogens" norms (Report at 25) simply does not answer the questions that were asked. OPR would effectively adopt a presumption of reckless behavior whenever the U.S. asserts immunity in contexts involving allegations of torture. That cannot properly be the right ethical standard. *See, e.g.*, Brief for the United States as Amicus Curiae, *Saudi Arabia v. Nelson*, 1992 WL 12012040, at *16 (May 18, 1992) (No. 91-522) (arguing that Saudi Arabia was immune from intentional injury suit pursuant to the Foreign Sovereign Immunities Act).

The most salient fact, which OPR dismisses, is that both of Judge Bybee's deputies assigned to the matter told him that he could properly sign the memos as written on the date that they were due. Report at 63. That should be enough to foreclose any inference of recklessness. It is also undisputed that *no one* ever told Judge Bybee during the course of the three month review process that the advice was wrong or that he should not issue these memoranda. As set forth below, Section II.D, *infra*, more than a dozen Executive Branch lawyers agreed with the Bybee Memos' core conclusions. OPR nevertheless concludes that Judge Bybee "should have known about the serious flaws in the memoranda" because Philbin "voiced … doubts" about certain portions of the Bybee Memo that he viewed as "*dicta*." Report at 257. But Philbin's "doubts" were hardly the type that would have given Judge Bybee cause to question the competence or candor of the memoranda. Philbin's comments would not give rise to an inference of negligence, let alone recklessness.

To start, OPR offers no evidence that Philbin expressed any concerns to Judge Bybee or anyone else related to many aspects of the advice that OPR now criticizes, including the Classified Bybee Memo that sets forth the analysis and conclusions authorizing use of the specific techniques in the interrogation of Abu Zubaydah. OPR instead identifies misgivings limited to the following issues, which did not even impact the conclusions, and certainly did not raise ethical concerns.

Philbin believed that the use of the medical benefits statute to construe the definition of "severe pain" was not very useful. *Id.* at 57. OPR does not indicate, however, whether Philbin ever raised this issue with Judge Bybee. Instead, OPR states that Philbin explained to Yoo that he did "not like" use of the statute and found it "imprudent to use in this context." *Id.* But Philbin also confirms that he believed that it was permissible, as a matter of legal reasoning, to seek guidance from these statutes. Indeed, he defended this feature of the Bybee Memo when it was later criticized by Judge Bybee's successor. *Id.* at 130. Philbin argued that the health benefit statutes could "shed light" on a lay person's understanding of severe pain. *Id.* at 130 n.103.

Philbin also told OPR that he was "concerned" with the specific intent analysis to the extent it "could be read" to exonerate interrogators who inflict severe pain with the motive of eliciting information. *Id.* at 57. Philbin recalls discussing this concern with Yoo, who responded by ensuring him that Michael Chertoff, the Assistant Attorney General of the Criminal Division, had reviewed the memo. *Id.* at 57-58. Philbin "believes" that he raised this concern with Judge Bybee as well. *Id.* at 168. Judge Bybee does not doubt Philbin's veracity, but does not recall the conversation. If Judge Bybee had properly understood the precise nature of Philbin's concern, however, he believes that he would have added clarifying language to eliminate any ambiguity. Such a sentence would have been fully consistent with the analysis set forth in both memos. As explained in detail in Section IV.A.2, *infra*, the actual analysis used in the Classified Bybee Memo, as well as all of OLC's communications with the CIA concerning the specific intent element, demonstrate that the CIA did not actually construe the memo to mean that a motive to acquire information would be exculpatory. Judge Bybee further confirmed to OPR in his interview that he does not read the memos to adopt this view of the law and does not believe that OLC intended to convey that view at the time. Bybee Tr. at 58-59.

With respect to the Commander-in-Chief section, Philbin recalls telling Yoo that it was "aggressive" and "not necessary to the analysis"—not "plainly wrong" or unprofessional. Report at 58. Philbin said he explained his concern to Judge Bybee "on the evening the opinions were signed." [redacted] OPR is not clear about what Philbin said to Judge Bybee to explain his "misgivings about the wisdom of including [this] section[]." Report at 62. Even if Philbin used the term "aggressive" when describing misgivings about the necessity of the section (*id.* at 58), that word is hardly synonymous with "unethical advice." Telling Judge Bybee that the section went "a step beyond" what OLC had concluded in the past and that it was "superfluous" is a far cry from warning him that the memo may not satisfy ethical duties of competence or candor. *Id.* Nor does OPR state that Philbin ever expressed disagreement with the view that the statute may not be constitutional as applied to an interrogation ordered by the President in defense of the nation. In fact, that core feature of the Commander-in-Chief analysis in the Bybee Memo—which reflected John Rizzo's interpretation of the section—was never actually repudiated by Judge Bybee's successors. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Deputy Assistant Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. § 2340-2340A* at 2 (Dec. 30, 2004) ("Levin Memo") (noting that the memo eliminated the Commander-in-Chief discussion because it was—and remains—"unnecessary"); Bradbury 2009 Memo at 2-4 (identifying statements OLC disavowed but not including any passage explicitly referencing interrogations ordered by the President).

Philbin's concerns about the section of the Bybee Memo discussing possible common law defenses also fall far short of ethical warnings. OPR does not say that Philbin ever told Judge Bybee that this section was wrong or poorly reasoned or lacking in candor. Rather, Philbin described the objectionable material as "dicta" that he would "prefer to delete." Philbin Submission at 4. Philbin recalls informing Judge Bybee on the evening the opinions were signed that the defenses section was "unnecessary and unwise because the primary conclusion of the opinions was that the specific conduct OLC had been asked to analyze did not violate the statute." *Id.* at 9.

Judge Bybee does not recall Philbin's misgivings about the inclusion of the two sections relating to possible defenses. He only recalls, which OPR does not dispute, that everyone in the room on the evening he signed the opinions agreed that he could appropriately do so. Nor is it surprising that Judge Bybee would not recall Philbin's expression of his views on this limited set of issues. Debate among OLC attorneys is standard fare and colleagues frequently express "concerns" to one another, particularly on complicated issues. Regardless, it is apparent that Judge Bybee had a perfectly good reason for declining to adopt Philbin's suggestion to delete these unnecessary sections. OPR found that "some number of attendees" at a July 16, 2002 meeting at the White House requested OLC to include them in the analysis, and John Yoo agreed to add the sections. Report at 52. Although Judge Bybee did not play a part in the decision to add the two sections to the draft, he recognized the value of answering the inevitable question

"What if a court disagrees with OLC's interpretation of the statute?" He questioned in his own mind whether the sections (particularly the Commander-in-Chief section) were sufficiently fulsome, but he did not want to delay the opinion or give disproportionate emphasis to questions that were not central to the question at hand. In Judge Bybee's view, even though the sections were merely advisory, and did not form the basis for OLC's conclusion that the proposed interrogation was lawful, the client was entitled to the analysis when requested. There is surely nothing reckless about answering questions a client asks.

Moreover, the most important feature of Philbin's account for the purposes of this ethics inquiry is his confirmation that he advised Judge Bybee that he could sign the memoranda without further revisions because he "agreed that the ten specific practices approved in the Classified Bybee Memo were lawful, and the unnecessary portions of the Bybee Memo did not affect that conclusion." Report at 63. Philbin explained that "[n]one of these concerns ... affected the outcome on the important question that OLC actually had to answer for the CIA: namely, whether the ten specific interrogation practices were lawful" and "[n]one of the conclusions about the legality of specific practices in the Classified Bybee Memo turned on the portions of the Bybee Memo that caused [him] concern." [redacted] In addition, Philbin concluded that the inclusion of the unnecessary analysis did not pose any genuine risk of harm. His submission explains that "there was no reasonable basis to expect that the background analysis in the Bybee Memo would be used to justify any operational activity apart from the specific practices described in the Classified Bybee Memo." *Id.* at 10. Philbin reasoned that given the caution reflected in the CIA's request for advice on a range of techniques, the precise description of the techniques in the Classified Bybee Memo, and OLC's express warning not to deviate from the advice, it was reasonable to assume "that the CIA would not be engaging in any interrogation practices that materially departed from the specifics described in the Classified Bybee Memo." *Id.* Further, Philbin added, "given the strict compartmentation of the CIA program, there was no reason to think that advice given to the CIA would have any use outside that agency." *Id.*; *see also* Bybee Tr. at 74-75 (noting that the Bybee Memo was "so closely held with us that [distributing it to non-attorneys in the field] would have struck me at the time as ... sort of a non starter, a non sequitur"); Bybee Tr. at 89 ("[The Bybee Memo] was very, very closely held, even inside my office. I would be very, very surprised, very disappointed if it was distributed outside of the narrow range for which it was intended.").

In short, OPR does not find that Philbin ever told Judge Bybee that the memo was actually wrong, let alone incompetent. OPR instead rests its conclusion of recklessness on its finding that Philbin told Judge Bybee "that the [Commander-in-Chief and defenses] sections were unnecessary, but that he could sign the memoranda." Report at 63. This is simply not the kind of "warning" that would cause a supervisor to question the competence or candor of the opinions. Philbin could not have ethically advised Judge Bybee to sign the memos if he had ethical concerns about them. Indeed, OPR properly finds that Philbin acted ethically. *Id.* at 256-57. But if Philbin's concerns did not put *Philbin* on notice of an ethical lapse, by definition, they could not put Judge Bybee on notice.

C. It Would Have Been Irresponsible for Judge Bybee to Hold the Opinions for Further Refinement in the Midst of a National Crisis

In OPR's view, Judge Bybee should have responded to Philbin's concerns, which were conveyed to him on the evening of August 1, by disregarding the CIA's urgent deadline so that he could "conduct[] independent research" and "read[] the authorities" in order to verify that the memos presented a "thorough, objective, and candid view of the law." Report at 257. Yet Philbin, the lawyer who best understands the nature of the concerns that he conveyed, has categorically rejected OPR's view that Judge Bybee should have withheld issuance of the memos pending further review. As Philbin explains in powerful terms, withholding the memos on August 1, 2002 would have been irresponsible because the advice the CIA had requested concerning the ten specific practices had been finalized and withholding that advice would have stopped the CIA's efforts to prevent threatened terrorist attacks in the United States.

OLC's decision regarding the memos "had to be made" on the night of August 1, 2002. Philbin Submission at 4. As Philbin explained, [redacted] "It was expected to a certainty that if the intelligence community did not unravel this plot in time, hundreds of Americans would be killed." *Id.* at 4. Meanwhile, the detention of Jose Padilla in May 2002 was a "particularly alarming development" because he was a U.S. citizen with a U.S passport and "[r]eliable intelligence" indicated that he had met with high ranking al Qaeda leaders and "was part of a plot either to blow up apartment buildings or to detonate a radiological 'dirty bomb.'" *Id.* at 4, 7. "It was unknown whether other al Qaeda operatives engaged in related or separate plots had already entered the country." *Id.* at 4. Because of these fears, known as the [redacted] "the intelligence community was gripped with an all-encompassing anxiety" [redacted] Indeed, as Philbin recounts, "[c]oncern for an attack in Washington was so high that leadership components in the Department, including OLC, were required to have a person staffing the off-site facility every business day, in case an attack disrupted operations at the Main Justice Building." *Id.*

As Philbin explained to OPR, "the two Bybee memos [were] finalized under a tight time deadline" in response to these national security concerns. *Id.* at 8. Once the CIA imposed a "hard deadline," "finalizing the opinions came down to a very intense crunch time over three to four days." *Id.* "The CIA insisted that they had to have a signed memo on the evening of August 1, 2002, because a team was waiting overseas to proceed with the investigation." *Id.* at 8. On the night of August 1st, even though it was already 9 or 10 p.m., Philbin reiterated the directive that the memos "ha[d] to be signed" that night. Report at 63. With such an "urgent need" to provide an answer, Philbin "concluded it would not be prudent to delay [OLC's] advice—and thereby delay the interrogation" in order to pursue the discussion of issues that were "unnecessary to answering the critical question" regarding the ten specific practices requested by the CIA. [redacted]

OPR never actually finds that Philbin's account of the events is inaccurate. To the contrary, it was corroborated by others. For example, John Bellinger, Legal Advisor to NSC, told OPR that [redacted] that "the CIA did not believe that they could get the information necessary to prevent the attacks and save American lives" without the use of harsh techniques that they believed to be "safe and effective." Report at 38. Instead of refuting these facts, OPR simply dismisses their relevance because "situations of great stress, danger, and fear do not relieve Department attorneys of their duty to provide thorough, objective, and candid legal advice, even if that advice is not what the client wants to hear." *Id.* at 254.

But surely situations of "great ... danger" would justify Philbin's judgment, and that of Judge Bybee, that delays for the purpose of pondering over unnecessary portions of the memoranda would be unwarranted. In fact, OPR does conclude that Philbin acted ethically when he advised Judge Bybee that he could sign the memos—a conclusion which is unquestionably correct. Yet OPR does not explain why the time pressures that excuse Philbin's decision to put aside his qualms regarding the memos do not apply with at least equal force to Judge Bybee, who was told about the issues the evening the opinion was due. As Philbin told OPR, "[u]nder the circumstances, urging that the opinion had to be delayed, that an interrogation had to be derailed, and that precious time had to be lost in order to resolve an argument over dicta would certainly have raised questions about Mr. Philbin's judgment." [redacted] As Philbin explained in a telling hypothetical:

> [C]onsider what the analysis of Mr. Philbin's conduct would be now if he had somehow prevented the issuance of the opinions, but events had turned out differently. What if the [redacted] threat had materialized in an attack that killed several hundred Americans? What would the Bi-partisan Congressional Commission appointed to investigate the failure to prevent the attack have said about Mr. Philbin's conduct if their investigation showed that the CIA had in custody an individual whom they believed could have provided information to prevent the attack; that all lawyers involved had agreed at the time that specified interrogation practices to secure vital information were lawful (and, indeed, later OLC analysis confirmed that the practices were lawful); but that one lawyer had prevented the CIA from gathering intelligence that would have saved American lives because he objected to dicta in a supporting memorandum *that was unnecessary to the conclusion that the specified practices at issue complied with the law?* Could any reasonable person think that the Congressional Commission would be praising Mr. Philbin's judgment if he had been that lawyer?

Id. at 23-24 n.9 (emphasis in original).[11]

The same analysis holds true for Judge Bybee. At this late stage, with the deadline at hand, Judge Bybee was hardly in a position to start the review process over in the way OPR suggests. If Philbin actually had concerns that the advice did not meet minimum ethical standards, he obviously could not and would not have counseled Judge Bybee that he could sign the memoranda.[12] After all, Philbin later showed on multiple occasions that he was willing to withhold his concurrence or advise his superiors against approving a particular opinion. Report at 78 ("Philbin told OPR that he had concerns about the Yoo Memo and that it was issued without his concurrence."); *id.* at 141 ("Philbin said he recommended to former DAG Comey that Comey should not concur in the Bradbury Combined Effects Memo."). The fact that he did not do so on August 1 demonstrates that he did not perceive or convey a risk that OLC was crossing an ethical line or granting the CIA a blank check to use whatever interrogation methods it wanted. The gravamen of OPR's whole case against Judge Bybee is accordingly premised on a distorted interpretation of Philbin's expression of concern on August 1, 2002. *Id.* at 257.

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[11] All emphases are added unless otherwise noted.

[12] As Judge Bybee told OPR, the long-standing tradition at OLC was that "before an opinion was brought to me it also always had to go through a second deputy to read." Bybee Tr. at 12. OPR itself conceded that a "second Deputy AAG reviews every OLC opinion *before* it is finalized." Report at 39 n.41.

D. Numerous High-Level Officials Reviewed And Concurred With The Memos

Judge Bybee's judgment that the memoranda fully satisfied OLC's ethical duties was also informed by the concurrence of other Executive Branch officials. As reflected in the attached chart, *see* Appendix 19, the undisputed facts show that despite the highly classified nature of the subject matter, a number of top officials beyond Judge Bybee's immediate team at OLC read and approved of drafts of the memos in part or in their entirety. Several others knew of the techniques under consideration and the basic legal arguments supporting their use. Yet there is no evidence that *any* of these individuals objected to OLC issuing the memos or raised any concerns regarding their contents with Judge Bybee. To the contrary, according to Philbin, **"[t]here was 100% agreement among officials in the Department who had been briefed (including the Attorney General, the Deputy Attorney General and the AAG for the Criminal Division) that even the harshest of the practices (waterboarding) did not constitute torture as defined in the statute."** [redacted] Rizzo confirmed that "*all of the Executive Branch lawyers* involved in reviewing the issues were satisfied that the memos reasonably concluded that the techniques at issue would not constitute torture." Rizzo Letter ¶ 3. In addition, numerous officials learned of the legal analysis after-the-fact and again ratified the memos in part or in full. OPR considers these facts "[ir]relevant" to its analysis (Report at 160), but the whole purpose of broad circulation is to provide an opportunity for review to generate objections. As OPR implicitly concedes, there were none. *Id.* at 259. And that can only be explained by the fact that the memoranda, whether they were right or wrong, obviously satisfied ethical standards.

As explained below, in addition to the OLC lawyers, the following officials reviewed and concurred in the memos or many of its core conclusions, either before they were issued or in the review that followed their issuance. Undoubtedly, many other attorneys—including, perhaps, dozens of DOJ attorneys—would have had some role in advising these officials. *See id.* at 130 (noting that "[v]irtually all of OLC's attorneys and deputies were included in the review process" of the Levin Memo).

Attorney General **John Ashcroft**

Deputy Attorney General **Larry Thompson**

Assistant Attorney General, Criminal Division, **Michael Chertoff**

Counselor to the Attorney General **Adam Ciongoli**

White House Counsel **Alberto Gonzales**

Deputy White House Counsel **Timothy Flanigan**

Counsel to the Vice President **David Addington**

Acting CIA General Counsel **John Rizzo**

Legal Advisor to the NSC **John Bellinger**

CIA General Counsel **Scott Muller**

Assistant Attorney General, OLC, **Jack Goldsmith**

Acting Assistant Attorney General, OLC, **Dan Levin**

Deputy Attorney General **James Comey**

Acting Assistant Attorney General, OLC, **Steven Bradbury**

Attorney General John Ashcroft. Ashcroft was briefed by Judge Bybee, received "regular briefings" about the opinion-writing process from Yoo, and received at least one draft of both the Bybee and Classified Bybee Memo toward the end of July. Report at 49, 60. Ashcroft may not have read the Bybee Memo but did read the Classified Bybee Memo and "engaged Yoo in a vigorous discussion of the memorandum's legal reasoning." *Id.* at 60. Ashcroft was reportedly "ultimately satisfied with the opinion's reasoning and analysis" and concluded that Yoo's position regarding waterboarding was "aggressive, but defensible." *Id.* National Security Advisor Condoleezza Rice, in fact, indicated that she would authorize the techniques as long as Ashcroft provided a personal opinion affirming their legality. *Id.* at 61.

Ashcroft generally recalled that he "was made aware that a legal opinion relating to the interrogation of al-Qaeda detainees was being prepared by OLC, that a draft or drafts were provided to [his] office, and that [he] was briefed on the general contours of the opinion's substantive analysis and on its conclusions, and that [he] approved its issuance." DOJ Hearing, Part V at 5 (statement of John Ashcroft). Later, at a meeting [redacted] [redacted] Ashcroft "forcefully reiterated the view of the Department of Justice that the techniques employed by CIA were and remain lawful and do not violate either the anti-torture statute or US obligations under the [CAT]." Report at 107-08. At the same meeting, Ashcroft and Philbin gave a "lengthy explanation of the law and the applicable legal principles" regarding the interrogation program. *Id.* at 109. [redacted] Ashcroft himself "had reviewed and approved them as lawful under US law." *Id.* at 110. A year later, in a letter to John McLaughlin (Acting CIA Director) on July 22, 2004, Ashcroft again confirmed that all of the EITs described in the Classified Bybee Memo, putting waterboarding aside, complied with U.S. law. *Id.* at 124. (Review of the waterboard was ongoing due to concerns that the CIA had exceeded OLC's guidance. *See infra* Section II.F).

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[13] [redacted]

Deputy Attorney General Larry Thompson. Yoo recalled briefing Thompson "at some point." Report at 60 n.59. Philbin expressed his understanding that Thompson was one of the DOJ officials who "had been briefed" and was in "100% agreement" that the practices in question did not constitute torture. [redacted] When the memoranda were complete, Yoo instructed [redacted] to deliver copies to Thompson's office. Report at 64.

Assistant Attorney General, Criminal Division, Michael Chertoff. Yoo briefed Chertoff on the CIA's proposed interrogation program as early as April 2002. Report at 42. After Philbin raised concerns regarding the Bybee Memo's specific intent analysis, Yoo asked Chertoff to review the memorandum. *Id.* at 57. Although there is some dispute as to the care with which Chertoff and Yoo discussed the memo, Chertoff remembered reading it and making two comments regarding the specific intent section. *Id.* at 58. With the caveat that he "had not checked the memorandum's legal research and that he assumed it was correct," Chertoff told Yoo that "although the discussion of specific intent might be correct 'in law school,' he would not want to defend a case in front of a jury on that basis." *Id.* at 58-59. Additionally, Chertoff told Yoo that "the more investigation into the physical and mental consequences of the techniques they did, the more likely it would be that an interrogator could successfully assert that he acted in good faith and did not intend to inflict severe physical or mental pain or suffering." *Id.* at 59. (As discussed below, Section II.E, *infra*, the final memos highlighted these observations.) With regard to the rest of the Bybee Memo, Chertoff told OPR that he did not look at the defenses section "particularly closely," and recalled that although he was "not in a position to sign onto [it]," he did not "disagree" with the Commander-in-Chief section. Report at 59.

[redacted]

Counselor to the Attorney General, Adam Ciongoli. Like Ashcroft, Ciongoli received "regular briefings" from Yoo and received drafts of both memos in late July. *Id.* at 49, 60. On August 1, 2002, Judge Bybee, Yoo, and [redacted] met with Ciongoli and "described the analysis and conclusions of the Bybee Memo." *Id.* at 62. Although Ciongoli did not recall reading the opinion or giving any comments, Yoo told OPR that Ciongoli was in the room when Bybee signed the opinion and "reviewed the last draft and continued to make edits until the last minute." *Id.* [redacted] also recalls Ciongoli suggesting changes to the Classified Bybee Memo at the final meeting. *Id.*

[redacted]

White House Counsel Alberto Gonzales. Gonzales met with Yoo and [redacted] on multiple occasions during the drafting process. On July 12, 2002, for example, Yoo and [redacted] "summarized the memorandum's conclusions" and provided Gonzales with a copy of the draft for review. *Id.* at 46. Several days later, on July 16, 2002, Yoo and [redacted] met again with Gonzales. While none of the individuals recall what was discussed, Yoo recalled providing Gonzales with a copy of his July 13, 2002 letter to John Rizzo discussing the specific intent element of the anti-torture statute. *Id.* at 50. [redacted] reportedly "agreed that the use of the water board [with respect to Abu Zubaydah and Khalid Sheik Muhammed] was well within the law, even if it could be viewed as outside the 'safe harbor.'" *Id.* at 105. At his confirmation hearing in 2005, Gonzales could not remember "whether or not [he] was in agreement with all of the analysis" of the Bybee Memo, but testified that he did not "have a disagreement with the conclusions then reached by the Department." *Confirmation Hearing of Alberto Gonzales* (2005).

Deputy White House Counsel Timothy Flanigan. Although it could not identify which meetings Flanigan attended, OPR believes it is possible that he joined Gonzales during one or more of his discussions at the White House with Yoo and [redacted] Report at 46, 50, 52. According to Flanigan, he was present at two briefings by OLC regarding the interrogation memos, during which he "probably asked some questions about the analysis." *Confirmation Hearing on the Nomination of Timothy Flanigan*, 109th Cong. (2005) (statement of Timothy Flanigan). Flanigan elaborated: "I think I may have asked questions about the statutory analysis to be sure that I understood what it was they were after. As a former head of the Office of Legal Counsel, my principal concern would have been to be sure that they had the statutory analysis correct, and that it sounded correct. I obviously didn't have the time or the resources or the role to redo the research that they were doing, but I just needed to hear them talk about the statute to be clear that this was something that made sense." *Id.* Flanigan also confirmed in a declaration submitted to OPR that he "believe[s] that [the Bybee Memos'] essential analysis is sound." Flanigan Decl. ¶ 3.

Counsel to the Vice President David Addington. Like Flanigan, Addington likely joined Gonzales during at least one of his discussions with Yoo and [redacted] Report at 46, 50, 52. In addition, Addington testified before Congress that Yoo added the Commander-in-Chief and defenses sections to the Bybee Memo because "that is what his client asked him to do." DOJ Hearing, Part III at 42 (testimony of David Addington). Addington testified that he considered himself "essentially as the client" given his role in the issues presented. *Id.* Addington also attended the March 24, 2003 meeting at which the group discussed the administration's legal posture regarding EITs." Report at 99.

Acting CIA General Counsel John Rizzo. Attorneys at the CIA were actively involved at every stage of OLC's opinion-writing process. The CIA IG Report confirmed that the CIA's

[redacted]

Office of General Counsel "conducted independent research and consulted extensively" with DOJ and NSC. CIA IG Report ¶ 6. Rizzo, a thirty-year veteran of the agency, said that he "had substantial personal involvement in the process." Rizzo Letter ¶ 2. He told Congress that he was aware of the Bybee Memo when it was issued and "did not, certainly, object to the memo." *Nomination of John A. Rizzo to be General Counsel of the Central Intelligence Agency: Hearings Before the Select Comm. on Intelligence*, 110th Cong. 26 (2007) (testimony of John Rizzo). Rizzo further confirmed to OPR that he concurred in OLC's view that the techniques were lawful even though "close to the line." Report at 37 n.36. He also confirmed that he did not "offer any specific objections to the analysis." *Id.* at 51.

[redacted]

Legal Advisor to the NSC, John Bellinger. Like Rizzo, Bellinger was very involved in reviewing and approving the legality of the proposed interrogation techniques under the anti-torture statute in 2002. The day after the opinions were signed, a CIA lawyer sent a cable confirming that the CIA had "extensive discussions" with Bellinger, as well as with DOJ, and received confirmation that "the use of [the EITs] is lawful." *Id.* at 65. Although Bellinger told OPR that he had a "turning point" in May of 2005 when OLC opined that the techniques were not cruel, inhuman, or degrading under Article 16 of the CAT (*id.* at 150), there is no indication that Bellinger ever raised any objections to the conclusions set forth in the Bybee Memos.[17] To the contrary, Rizzo confirmed that Bellinger "did not express reservations about the conclusions set forth in the memos" and "was firmly on board with OLC's assessment that the techniques at issue did not meet the restrictive definition of torture set forth in the statute." Rizzo Letter ¶ 3.

From the outset, Bellinger played a central role in the review process. He hosted the initial meeting with OLC and the CIA on April 16, 2002, and assumed responsibility for briefing NSC Advisor Condoleezza Rice, Deputy NSC Advisor Stephen Hadley, and White House Counsel Alberto Gonzales. Report at 40, 42. He continued to attend meetings during the summer (*id.* at 46, 61), including the July 13, 2002 meeting, where Yoo provided him with a copy of the draft memorandum. *Id.* at 47. Bellinger also attended an NSC meeting with Rice, Hadley, and [redacted] (CIA Director Tenet's Chief of Staff) the day before the memos were due, which included a discussion of the proposed interrogation of Abu Zubaydah. *Id.* at 61.

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[17] OLC was never asked to address Article 16 in the Bybee Memos. *Cf.* Bradbury Techniques Memo at 3 n.5 (noting that OLC had not yet addressed the possible application of Article 16 of the CAT).

When the CIA sought reaffirmation of the legality of the interrogation program the following year, Bellinger attended the July 29, 2003 meeting where Ashcroft "forcefully reiterated" the legality of the interrogation techniques. *Id.* at 106. In addition, Bellinger actively participated in the administration's response to the Leahy letter concerning the humane treatment of detainees. Bellinger attended the White House meeting on June 20, 2003 to discuss the letter, edited the response, and agreed that the use of the waterboard on Khalid Sheik Muhammed and Abu Zubaydah was "well within the law." *Id.* at 104-05.

CIA General Counsel Scott Muller. As CIA General Counsel from October 2002 through 2004, Muller played a significant role after OLC issued the Bybee memos. First, as OLC was drafting the Yoo Memo in 2003, Muller wrote [redacted] that he had "read and reread the DOJ opinion and we are fine." *Id.* at 79. Muller noted that he "gave John Yoo some other edits to eliminate or tone down any reference to the need for necessity as a defense." *Id.* Second, Muller was instrumental in the development of the "Bullet Points" summarizing OLC's legal advice to the CIA. *Id.* at 100-03. Muller told OPR that both OLC and CIA attorneys "formally concurred" on the Bullet Points on June 4, 2003. *Id.* at 102. [redacted] In the subsequent discussion, Muller explained that the instances of detainee deaths were unrelated to the interrogation program. *Id.* at 109. Muller also gave a description of the CIA's waterboard technique, which reportedly prompted Ashcroft to say that the CIA was "well within" the scope of OLC's legal advice. *Id.* [redacted] reiterated the CIA's reliance on the Bullet Points at the meeting itself, and agreed afterward with Bellinger and [redacted] that the CIA's use of the waterboard remained "well within the law." *Id.* at 104-05.

Assistant Attorney General, OLC, Jack Goldsmith. Judge Bybee's successors at OLC continued to approve the CIA's interrogation techniques relying primarily on arguments and authorities set forth in the Bybee Memos. OPR is fixated on select criticisms of portions of the memos without giving any credence to repeated reaffirmations of the conclusions. It bears emphasis that Goldsmith, who was obviously not reticent to withdraw memos that he questioned, chose not to withdraw the Classified Bybee Memo. Goldsmith instead expressly reaffirmed the legality of nine of the ten techniques and only suspended approval of the waterboard pending review of allegations that CIA interrogators had exceeded important limitations outlined in OLC's advice. *Id.* at 115, 123.

Goldsmith's harshest criticisms were actually directed at the 2003 Yoo Memo. *See id.* at 112. While there is no ethical violation in the Yoo Memo, OPR bases its findings of misconduct exclusively on the Bybee Memos. *Id.* at 255 (contending that Judge Bybee assumed responsibility for the ethical soundness of the Bybee Memos when he reviewed and signed them). Although there was substantial overlap between the memos, many of Goldsmith's criticisms were directed at portions that were not included in the Bybee Memos. *Id.* at 117-21. Indeed, OPR elsewhere recognizes that Goldsmith characterized the "*Yoo Memo*"—not the Bybee Memos—as a "'blank check' to create new interrogation procedures without further DOJ review or approval." *Id.* at 112. Goldsmith explained that the Yoo Memo, unlike the Bybee Memo, was not issued in tandem with the Classified Bybee Memo that included a series of limitations on the CIA's program. Goldsmith was concerned that the Yoo Memo, standing alone, "could have been used to justify many additional interrogation techniques." *Id.* at 112. Philbin similarly told OPR that he "was not concerned that the Bybee Memo would be used independently to approve further interrogation practices," but that the Yoo Memo "presented a different picture" because "there was no document from OLC like the Classified Bybee Memo limiting the advice to DOD." [redacted] Thus, OPR overstates the scope of Goldsmith's criticisms of the Bybee Memo (*e.g.*, Report at 160) and places no weight whatsoever on Goldsmith's decision to preserve the Classified Bybee Memo and to reaffirm its core conclusions.

Acting Assistant Attorney General, OLC, Dan Levin. After Goldsmith resigned, Levin took over as head of OLC and approved use of the waterboard on an individual detainee [redacted] within a matter of weeks of the CIA's request.[18] Letter from Levin to Rizzo (Aug. 6, 2004) (Appendix 15). Levin stated that the question was a "close and difficult" one, but concluded that the technique was lawful, noting in his letter to Rizzo that OLC would "supply, at a later date, an opinion that explains the basis for this conclusion." *Id.* Like Goldsmith, Levin elected not to withdraw the Classified Bybee Memo and in fact approved the use of three new techniques (dietary manipulation, nudity, and water dousing) on individual detainees in addition to those previously addressed by OLC. *See* Letter from Levin to Rizzo (Sept. 6, 2004); Letter from Levin to Rizzo (Sept. 20, 2004) (Appendix 15). When Levin replaced the Bybee Memo in the wake of public criticism, he followed a process that included "[v]irtually all of OLC's attorneys and deputies," as well as comments from Paul Clement (Solicitor General), Philbin, and others. Report at 130. The final product, however, included many of the same arguments and authorities as the Bybee Memo, adopted standards with minimal differences, and in many respects provided the CIA with far less information about the most relevant case authority. Even as Levin replaced the Bybee Memo, he reaffirmed the advice OLC gave in the Classified Bybee Memo. Levin Memo at 2 n.8. Moreover, the Levin memo also includes many of the same "errors" and "omissions" that OPR has allegedly discovered in the Bybee Memo.[19]

Deputy Attorney General James Comey. Comey joined Ashcroft at a NSC Principals Meeting on July 2, 2004 to discuss the possible interrogation of CIA detainee Janat Gul. Report at 123. Ashcroft and Comey conferred with Goldsmith after the meeting, leading to Goldsmith's letter to Muller approving all of the techniques described in the Classified Bybee Memo except for the waterboard. *Id.* Comey later reviewed and approved the Bradbury Techniques Memo,[20] which expressly concluded that the use of the waterboard in the manner described did not constitute torture in violation of the statute. *Id.* at 130, 141. Although Comey withheld his concurrence for the Bradbury Combined Techniques Memo at Philbin's recommendation, his decision was based primarily on the fact that the memo was inappropriately "theoretical" because it was "not tied to a request for the use of specific techniques on a specific detainee." *Id.* at 141.

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[18] The waterboarding technique that Levin authorized was, in fact, far more intensive than the procedure outlined in the Classified Bybee Memo. Whereas the Classified Bybee Memo cautioned against substantial repetition (Classified Bybee Memo at 2), [redacted]

[19] Notably, even concurring officials often disagreed among themselves about the proper analysis, illustrating why these matters represent fair ground for debate. Philbin, for example, had "spirited discussions" with Levin regarding the proper analysis of severe pain, defending the analysis from the Standards Memo. Report at 130. Levin, in turn, thought that Bradbury's Article 16 Memo was "just wrong." *Id.* at 150. These debates further highlight the danger of allowing analytical disagreements to form the basis for ethics investigations.

Acting Assistant Attorney General, OLC, Steven Bradbury. In 2005, Bradbury drafted a series of opinions that reaffirmed—indeed, even expanded upon—the analysis set forth and techniques approved in the Bybee Memos. The Bradbury Techniques Memo, for instance, "found the CIA's proposed use of thirteen EITs, including forced nudity, extended sleep deprivation,[21] and the waterboard to be lawful." *Id.* at 141. Notably, Bradbury approved the use of shackling to keep detainees awake and determined that stress positions were allowable because they were "limited by the individual detainee's ability to sustain the position." Memorandum from Steven G. Bradbury for John A. Rizzo, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of A High Value al Qaeda Detainee*, at 33, 34 (May 10, 2005) ("Bradbury Techniques Memo"). Like Levin, Bradbury also repeated much of the analysis OPR finds objectionable, particularly with respect to the element of specific intent. *Id.* at 27-28.

All in all, this history demonstrates that from the earliest stages attorneys throughout the executive branch—including DOJ, the White House, the NSC, the CIA, and beyond—reviewed, approved, and ratified the advice contained in the Bybee memos. OPR easily quotes authors, pontificators, and pundits, but fails to acknowledge that *every* high-ranking government official—charged with making actual decision—agreed with the memos' core conclusions.

If the memos' conclusions were as untenable as OPR alleges, surely some of these sophisticated lawyers would have counseled Judge Bybee not to issue these opinions. They did not. OPR properly finds that none of them engaged in misconduct. Report at 259. But the same conclusion applies with equal measure to every DOJ lawyer involved in responding to these difficult questions.

E. The Memos Were Limited In Scope And Adequately Disclosed Risks And Uncertainties Which the CIA Understood

OPR asserts that OLC's legal advice in the Bybee Memo was "an aggressive interpretation of the torture statute," that was "drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs." Report at 226, 230. That is in itself a rather surprising conclusion since OPR declines to determine whether that reading of the statute was wrong, let alone obviously wrong (*id.* at 160), and never explains how the anti-torture statute could have been properly interpreted to prohibit the proposed conduct. OPR also repeatedly finds that the Bybee Memos did not adequately inform the CIA of risks and uncertainties associated with the proposed course of conduct. *See, e.g.*, *id.* at 175, 231. Those conclusions are not supported by the actual language of the memos or the evidence concerning the CIA's understanding of the risks disclosed throughout their "extensive discussions" with DOJ. *Id.* at 65. Indeed, OPR's conclusions are directly contradicted by the CIA General Counsel at the time, who confirmed that "the memos adequately informed [him] about the relevant risks and provided [him] with the information that [he] needed to advise the CIA." Rizzo Letter ¶ 4.

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[20] We refer to the Memorandum from Steven G. Bradbury for John A. Rizzo, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of A High Value al Qaeda Detainee* (May 10, 2005) as the "Bradbury Techniques Memo."

[21] [redacted]

OPR studiously ignores or discounts the limiting language that pervades both Bybee Memos, characterizing key qualifications as "cursory" or insufficient in light of documents Judge Bybee never reviewed or was even aware of. Report at 175.[22] And OPR never attempts to square its conclusion with the fact that the Bybee Memo was issued in tandem with the Classified Bybee Memo, an opinion Goldsmith described as "hyper narrow and cautious and splitting hairs and not going one millimeter more than you needed to answer the question." *Id.* at 122; *see also* Bybee Tr. at 115 (noting that the two memos "were intended to be read" together). OPR has no explanation for why OLC's attorneys would produce such a "hyper narrow" document if, as OPR contends, they "were aware of the result desired by the client and drafted memoranda to support that result." Report at 227. As demonstrated by the attached chart, *see* Appendix 18, any fair reading of the Bybee Memos in their entirety reveals that both memos contained ample cautionary and conditional language that limited their actual conclusions to the question at hand: whether the use of the ten specific interrogation techniques identified by the CIA for use on a single detainee would violate §§ 2340-2340A. And the undisputed facts confirm that the CIA understood the risks.

First, as shown in Appendix 18, the Bybee Memo set forth OLC's interpretation of the statute in careful terms, attempting to draw a concrete and understandable line between those extreme activities that constitute torture and other, lesser forms of harsh treatment that might constitute cruel, inhuman, and degrading conduct:

- In analyzing the specific intent element of the statute, OLC described certain arguments as "theoretical" in nature (Bybee Memo at 4, 5), hardly a sensible characterization for an "aggressive interpretation" of the statute. Report at 230. This section also stated not once, but twice (and probably as a direct result of Chertoff's comments) that a jury could infer a defendant's specific intent, and indeed would "in all likelihood" do so in instances where the defendant knew that his actions would produce the prohibited result. Bybee Memo at 4, 5.

- In the severe pain section, OLC did not hide the fact that it was reasoning by analogy in referencing the health care statutes; it acknowledged straight away that those statutes "address a ***substantially different subject*** from Section 2340," but found that "they are nonetheless helpful for understanding what constitutes severe physical pain." *Id.* at 6. OLC also did not limit the kinds of disorders that would satisfy the prolonged harm requirement for mental pain and suffering under the statute. Rather, it noted that examples such as chronic depression "are in no way intended to be an exhaustive list," but are "merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that 'disrupt[s] profoundly the senses or the personality.'" *Id.* at 11-12.

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[22] For example, OPR faults Judge Bybee for errors and omissions it thinks are in the Bullets Points. Report at 161, 175, 232. That memo was issued in June 2003, months after Judge Bybee left the Department. *Id.* at 100-02, 165. To this day, Judge Bybee has not seen the Bullets Points.

- In the section on U.S. Judicial Interpretation, OLC explicitly cross-referenced an appendix of cases involving conduct (including seven typical acts of violence) which courts have determined amounted to torture. *Id.* at 24. OLC cautioned that "[w]hile we *cannot say with certainty* that acts falling short of these seven would *not* constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law." *Id.* (second emphasis in original).

- In the Commander-in-Chief section, OLC repeatedly references the Commander-in-Chief power as it pertains to the *President* and any orders he may give regarding interrogation of enemy combatants. *Id.* at 31, 39.

- Finally, the Standards Memo emphasizes on numerous occasions that any defenses that "might be available" would only "potentially" eliminate criminal liability. *Id.* at 39; *see id.* at 1 ("*possible* defenses"), 2 ("necessity or self-defense *may* justify interrogation methods"), 40 ("necessity defense *may* prove especially relevant"), 46 ("necessity or self-defense *could* provide justifications").

Second, the Classified Bybee Memo was even narrower in scope, examining the ten specific interrogation techniques while repeatedly cross-referencing the Bybee Memo. Classified Bybee Memo at 9, 10, 11, 12, 13, 15, 16, 17. Critically, the aspects of the Bybee Memo that OPR finds most objectionable—the so-called information motive, the Commander-in-Chief limitation, and the common law defenses—are not incorporated in *any manner whatsoever* in the Classified Bybee Memo. Rather, OLC stated (accurately) that "[t]o violate the statute, an individual must have the specific intent to inflict severe pain or suffering." *Id.* at 16. In addition, OLC placed numerous restrictions on the CIA's proposed program itself, making clear that its advice was "limited to the[] facts" presented to it, and that its advice "would not necessarily apply" "[i]f these facts were to change." *Id.* at 1. For example, OLC limited the duration of the enhanced interrogation phase, stating that it was expected to last "no more than several days" and in any event no more than thirty days. *Id.* It also included time restrictions on the specific techniques. Confinement of the detainee, for example, could not last more than two or eighteen hours, depending on the size of the space. *Id.* at 2-3. The waterboarding technique in particular was highly circumscribed. In fact, use of the waterboard was limited to no more than 20 minutes during any application. During that period, the detainee's air flow would be restricted for at most 20 to 40 seconds at a time, and after the 20 to 40 seconds, the detainee must be "allowed to breathe unimpeded for three or four full breaths." *Id.* at 4. And there were restrictions on repetition; OLC expressed its understanding that although some techniques might be used more than once, "repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions."[23] *Id.* at 2. Along with these parameters, OLC required that a specially-trained medical expert, with the authority to terminate the interrogation if necessary to prevent severe physical or mental harm, had to be present at all times. *Id.* at 4, 16. The Classified Bybee Memo ended with a final note of caution, "emphasiz[ing] that this is our best reading of the law," while noting "that there are no cases construing the statute, just as there have been no prosecutions brought under it." *Id.* at 18.

Third, the force of these cautionary statements may have been lost on OPR but they were not lost on the CIA. John Rizzo, the CIA counsel identified as a "client" on the OLC log sheet, told OPR that he understood that the issue of legality was "close to the line." Report at 37 n.36. Rizzo likewise said that he was "aware that the issues were uncertain and that there were no controlling precedents." Rizzo Letter ¶ 1. Another CIA lawyer, [redacted] confirmed his understanding the day after the memos were issued that the statute would not prohibit the techniques proposed "in light of the specific facts and circumstances" that had been described. Report at 65. And Yoo made clear to Rizzo that the CIA's due diligence to establish good faith was not a foregone conclusion but depended on "such actions as surveying professional literature, consulting with experts, or evidence gained from past experience." *Id.* at 48.

Read together, the Bybee Memos are forthright in acknowledging the complexity and uncertainty of the anti-torture statute, providing a comprehensive but adequately qualified interpretation of the various elements and the allowable interrogation techniques. The scale and scope of the limiting language in the memos belies OPR's assertion that OLC drafted them to support the result "desired by the client." *Id.* at 227. As OPR noted, the CIA was understandably "seeking maximum legal protection for its officers" (Report at 226), but OLC established key legal and factual boundaries that fell far short of the advance declination the CIA requested from the Criminal Division.[24] *See* Rizzo Letter at ¶ 5 (noting that once Rizzo was "advised that the Criminal Division would not issue an advance declination of prosecution, [he] did not pursue the issue any further.").

F. OLC's Clients Did Not Misinterpret The Legal Advice Set Forth In The Memos

OPR repeatedly insinuates that OLC's legal advice was open to misinterpretation and thus may in some measure be responsible for instances of detainee abuse inflicted by CIA interrogators. *See, e.g.*, Report at 233 (contending that Judge Bybee and Yoo were wrong to argue "that there was little danger of people in the field using the Unclassified Bybee Memo to justify actions that went beyond those specifically approved in the Classified Bybee Memo"). But there is no evidence that OLC's clients—the White House or the CIA—ever misinterpreted the legal advice set forth in the memos or used it to justify interrogations beyond the limits established in the Classified Bybee Memo or to shield themselves from prosecution. To the contrary, the CIA told OPR that its interrogation program "relied on the analysis provided *in the*

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[23] OPR also expected the techniques "to be used in some sort of escalating fashion," rather than simultaneously, Classified Bybee Memo at 2, another important constraint on the CIA's program.

[redacted] This further demonstrates that OLC was hardly a rubber stamp providing the CIA with approval for anything it wished.

Classified Bybee Memo" (*id.* at 124 n.95), and not the allegedly broad language of the Bybee Memo. *See also* Rizzo Letter ¶ 5 (in advising the CIA, Rizzo "relied on the analysis and limitations set forth in the [C]lassified Bybee Memo because it specifically addressed the application of the statute to the proposed conduct"); *id.* ¶ 3 (Rizzo was "principally concerned with the conclusions in the Classified Bybee Memo"). Moreover, Rizzo confirmed that he never interpreted the Bybee Memo to immunize interrogators so long as they had a motive to obtain information, did not cause organ failure, acted pursuant to the Commander-in-Chief power, or asserted a common law defense. *Id.* ¶ 5. And even if there were evidence of misinterpretation, OPR never actually refutes Philbin's correct assessment "that there was no reasonable basis to believe that the Bybee Memo would be used to justify any operational activity apart from the specific practices authorized in the Classified Bybee Memo." Report at 63. The undisputed facts demonstrate that the risk OPR imagines never materialized because it was never a genuine risk.

First, three independent commissions investigated instances of detainee abuse and *none* concluded that OLC's legal advice or approved interrogation techniques were responsible.[25] In May 2004, the CIA Inspector General conducted an extensive investigation including substantial criticisms of the CIA program. The IG never suggested that OLC's advice had contributed in any way to abuses that it discovered. To the contrary, the IG found that OLC provided "finely detailed analysis to buttress the conclusion that Agency officers *properly carrying out EITs* would not violate the Torture Convention's prohibition of torture." CIA IG Report ¶ 253. According to the Report, the few instances of unauthorized techniques involving the waterboard "went beyond the projected use of the technique as originally described to DoJ." *Id.* ¶ 10; *see also* Letter from Jack Goldsmith to Scott Muller (May 27, 2004) (noting that the CIA's actual interrogation practice "may not have been congruent with all of the[] assumptions and limitations" contained in the Classified Bybee Memo).

Two other investigations reached the same conclusion. In August 2004, a panel chaired by former Secretary of Defense James R. Schlesinger issued a report concluding that "[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred." James R. Schlesinger, *Final Report of the Independent Panel to Review DoD Detention Operations* at 5 (Aug. 2004). And in March 2005, after conducting an extensive investigation, including over 800 interviews, Vice Admiral A.T. Church III concluded that there was "no link between approved interrogation techniques and detainee abuse." A.T. Church III, Office of the Secretary of Defense, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques* 13 (Mar. 7, 2005) ("Church Report").[26] The report found that "[a]n early focus of [the] investigation was to determine whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees. *We found this was not the case.*" *Id.* at 3.

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[25] In fact, most of the instances of detainee abuse occurred outside of the interrogation context. [redacted]

[26] Moreover, a similar Senate Armed Services Committee Report did not find any causal connection between OLC's legal advice and the few rogue individuals who used unauthorized interrogation techniques.

OPR offers no facts of any kind to refute the unanimous judgment of these three investigations. It offers details of detainee abuse without ever explaining why OLC could possibly have responsibility for that abuse. Report at 86-90. The decision to include these incidents cannot be explained. It is inflammatory and irresponsible. There was no evidence—none—that the CIA interrogators who were involved acted on the basis of some belief that they had been "immunized" by OLC. To the contrary, the CIA [redacted] described the interrogation techniques used on Al-Nashiri as *unauthorized* in his referral to the CIA Inspector General. *Id.* at 87. [redacted]

Second, there is no indication whatsoever that the CIA interpreted OLC's advice to allow the use of unauthorized techniques based on the view that the interrogators had no "purpose" to disobey the law (*id.* at 171), or only acted with a motive to "obtain[] information" (*id.* at 169), or were shielded by the President's Commander-in-Chief powers (*id.* at 197), or were entitled to claim necessity or self-defense. *See* Rizzo Letter ¶ 5 (confirming that Rizzo did not interpret the Bybee Memo to provide immunity from prosecution on any of these grounds). To the contrary, OPR actually concedes that the CIA only relied on the Classified Bybee Memo. Report at 124 n.95 ("Prior to the Bullet Points controversy, the CIA did not seek OLC approval to use EITs on new prisoners brought into the CIA interrogation program, but *simply relied on the analysis provided in the Classified Bybee Memo*. After Goldsmith disavowed the Bullet Points, however, the agency appears to have sought written approval when it intended to use EITs."). As explained in Section IV.H, *infra*, the analysis in the Classified Bybee Memo did not rest in any way on any of these issues.

In addition, the documents that OPR uses to reveal the CIA's understanding of the standards in the Bybee Memo (*e.g.*, Report at 65-66) do not suggest there was any misinterpretation going on. As shown in subsequent sections, these documents (which Bybee never wrote or saw) were actually *correct* statements of the law. [redacted] memo to the Abu Zubaydah interrogation team, for instance, which quoted from Yoo's July 13, 2002 fax to Rizzo, provided a *correct* summary of the specific intent element. Report at 66; *infra* Section IV.A. It is *correct*, as Yoo wrote, that if an individual "undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture." Report at 48; *infra* Section IV.A. The Bullet Points that the CIA prepared in 2003 also provided a *correct* summary of types of investigation that would establish a good faith belief that one did not intend to cause severe pain or suffering. Report at 103; *infra* Section IV.A. Notably, the CIA *never* mentions the motive of the interrogator as somehow negating the specific intent element of the anti-torture statute. And the CIA *never* mentions the Commander-in-Chief powers or the common law defenses in any of its cables or interrogation manuals.

The evidence demonstrates that the CIA did not share OPR's illusions regarding the scope of OLC's legal advice. Rizzo has confirmed (Rizzo Letter at 3) that the he never relied on the Bybee Memo as any sort of "golden shield" or "advance pardon," as Goldsmith described. Report at 197. Moreover, the CIA confined itself to the narrowly circumscribed analysis in the

Classified Bybee Memo in conducting its interrogation program, and recognized explicitly in Fredman's cable to the field that the legal conclusions were made "in light of the specific facts and circumstances of the interrogation process."[27] *Id.* at 65. The CIA's own Interrogation Guidelines, moreover, make no reference to any of the exceptions OPR claims were susceptible to misuse. Although OPR never cites them, they state that "medical and psychological personnel must be on site during all detainee interrogations employing Enhanced Techniques" and that in each case they "shall suspend the interrogation if they determine that significant and prolonged physical or mental injury, pain, or suffering is *likely to result* if the interrogation is not suspended." DCI Guidelines on Interrogations 2 (Jan. 28, 2003), *included at* CIA IG Report app.E. That guidance obviously forecloses any claim that the CIA was reading the memos to authorize interrogations motivated by the need for information. If the CIA believed it received a "golden shield" from OLC, the Classified Bybee Memo would have been superfluous, it would have written its guidelines differently, and it likewise would never have needed to refer the instances of unauthorized interrogation techniques to federal prosecutors. Report at 90.[28]

Third, OLC never sought to provide the CIA with immunity and no one could rationally rely on any attempt to do so. The Bybee Memo only discussed possible defenses for "properly authorized" interrogations. Bybee Memo at 45. Both Judge Bybee and Philbin confirmed that OLC never intended to provide the CIA with the exculpatory grounds OPR says the OLC legal advice implies. *See* Bybee Tr. at 112-13 (OLC did not give the CIA carte blanche "to do whatever it wished"); Report at 199 ("Philbin told OPR that he was not aware of any evidence of intent to provide immunity to CIA officers."). Philbin went on to say, and OPR cites nothing to the contrary, that there was "no reasonable basis to believe that the Bybee Memo would be used to justify any operational activity apart from the specific practices authorized in the Classified Bybee Memo." Report at 63.[29] Even OPR's lead investigator stated that it would be a "gross distortion" to read the Bybee Memo as allowing an interrogator to avoid prosecution by claiming that he used unauthorized techniques "in furtherance of the president's war-making powers." Bybee Tr. at 90.

OPR also fails to recognize that no CIA interrogator could rationally rely on the Bybee Memo as a form of immunity because Judge Bybee had no power to bind courts or future administrations. For example, common law affirmative defenses, such as necessity or self-defense, would fall within the province of a court and/or jury.[30] It would be little comfort to a defendant facing a criminal charge that OLC, the "definitive interpreter of the law within the Executive Branch," said that certain defenses *might* be available. Likewise, the Commander-in-Chief section never advised CIA officials that they would be immune from prosecution no matter what they did. To the contrary, the Bybee Memo explained that this section was only addressed to interrogations "ordered by the President" and to the interrogations "*he* believes necessary to prevent attacks upon the United States" (Bybee Memo at 39), which is how Rizzo interpreted it. Rizzo Letter ¶ 5 (Rizzo "interpreted the Commander-in-Chief section to refer to interrogations personally ordered by the President but [he] did not view it as a form of 'immunity'"). And of course an OLC opinion can be revoked at will by the next head of the office, which is precisely what happened to the Bybee Memo, and later to the Levin Memo and the Bradbury Memos. *See* David J. Barron Memorandum for the Attorney General, *Withdrawal of Office of Legal Counsel CIA Interrogation Opinions* (Apr. 15, 2009). Hardly a shield made of gold. In short, OLC never gave, and the CIA never thought it received, any protection based on a motive for information, the Commander-in-Chief powers, or common law defenses.

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[27] Rizzo's recollection that neither Bellinger nor Yoo expected him to brief OLC "on every new variation or technique that comes up," Report at 233, has absolutely nothing to do with Judge Bybee and is flatly contradicted by the text of the Classified Bybee Memo.

[28] Notably, the declination memorandum prepared by the CIA's Counterterrorism Section regarding the death of Gul Rahman provides a *correct* explanation of the specific intent element and did not rely on any motivation to acquire information. Report at 92. If Zirbel, as manager of the Saltpit site, did not intend for Rahman to suffer severe pain from low temperatures in his cell, he would lack specific intent under the anti-torture statute. And it is also telling that the declination did not even discuss the possibility that the prosecution was barred by the Commander-in-Chief section of the Bybee memo.

[29] As discussed below (Sections IV.B.2, IV.F.1, IV.H), Philbin reasoned that given the caution reflected in the CIA's request for advice on a range of techniques, the precise description of the techniques in the Classified Bybee Memo, and OLC's express warning not to deviate from the advice, it was reasonable to assume that the CIA would not depart from the specific techniques listed in the Classified Bybee Memo.

III. OPR'S FINDINGS OF MISCONDUCT ARE PREDICATED ON A COMPLETELY ERRONEOUS INTERPRETATION OF THE GOVERNING STANDARDS

OPR's finding that Judge Bybee engaged in misconduct cannot be upheld because the entire analysis is based on the supposed violation of ethical duties that do not exist. As discussed in the succeeding sections, OPR implicitly concedes that: (1) the opinion reflected Judge Bybee's (and John Yoo's) honest assessment of the correct interpretation of the law; (2) the core of the analysis has been vindicated by appellate decisions and none of the actual conclusions were contrary to settled precedent; (3) the research and analysis that was done to form the basis of OLC's conclusions did not fall below the required level of competence; and (4) the clients understood that these were unsettled questions of law with risks and uncertainties. These concessions would lead any other disciplinary body to dismiss the charges out of hand. But OPR ignores them. According to OPR, the Bybee Memos violated a duty to provide "thorough, objective, and candid legal advice" (*e.g.*, Report at 254), because the discussion supporting OLC's conclusions was "incomplete and one-sided." *Id.* at 258. In OPR's view, there is a duty to "identify any counter arguments" whenever counsel prepares a written memorandum explaining his opinion. *Id.* at 24.

That has never, ever been the law. Professor Hazard's expert opinion establishes this beyond any doubt. Letter from Geoffrey C. Hazard, Jr. to Maureen E. Mahoney ¶ 11 (Oct. 7, 2009) ("Hazard Letter") (Appendix 4). But there is also another easy way to tell. Just take a look at the authorities that OPR cites to support its interpretation of the governing ethical standards. OPR has produced a 261 page report that ***fails to cite a single case that found a violation of a disciplinary rule***. Not one. Given the millions of opinions lawyers have written over the course of our profession, surely some bar authority somewhere would have found a violation of the duty that OPR has identified. Perhaps OPR should have recognized that its premise was wrong when it could not find a single decision that even suggests such a duty. It nonetheless proceeded to find misconduct while citing a sum total of five cases that have nothing anything at all to do with the ethical standard OPR created. Report at 22-24. Three of the five involve judicial sanctions for inadequate research. *Id.* at 23-24. A fourth involves an ineffective assistance claim based on defense counsel's negligent investigation of his client's criminal record. *Id.* at 23. The fifth, *In re Ford*, 797 A.2d 1231 (D.C. 2002), is cited in a footnote to support OPR's concession that errors must rise to the level of a "serious deficiency" in the representation to support a finding of misconduct. Report at 23 n.25. And *Ford* is the *only* D.C. precedent cited in OPR's entire report despite OPR's finding that the "D.C. Rules of Professional Responsibility apply to [Bybee's] conduct." *Id.* at 20. (But that is an improvement over OPR's Draft Report which ignored even *Ford*, and failed to cite a single D.C. case.)

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[30] *See, e.g.*, Ronald Smothers, *Judge Won't Let Accused in Clinic Attack Argue That Killing Was Justified*, N.Y. Times, Oct. 5, 1994, at A18 (court rejected necessity defense in homicide case where "the defense [was] trying to apply the justification defense to something that is protected by law").

A review of the text of the rules, the comments, and the governing body of precedent leave no doubt that OPR has inexplicably misinterpreted the law. No disciplinary opinion has ever adopted standards that permit the kind of line-by-line scrutiny of the quality of legal work product undertaken by OPR in this report. To the contrary, the D.C. Court of Appeals held in no uncertain terms that ethical conduct must be assessed through reference to counsel's "[]attention" to the matter—and not the quality of the lawyer's analysis—because disciplinary boards cannot serve as a "sort of court of appeals from lawyers' judgments." *In re Stanton*, 470 A.2d 281, 287 (D.C. 1983). OPR has done precisely what *Stanton* forbids, and along the way failed to make the findings actually required for proof of a disciplinary violation under standards established by OPR's own guidance and the D.C. Rules. Its conclusions must be rejected.

A. OPR Has Impermissibly Adopted Standards That Exceed Requirements of the D.C. Rules

1. OPR failed to find that there is clear and convincing evidence that Judge Bybee violated a specific rule of professional responsibility as required by D.C. law

A bar referral must be premised on clear and convincing evidence of a violation of a specific rule in the D.C. Rules of Professional Conduct.[31] OPR did not even meet these threshold prerequisites.

First, OPR never expressly states what rule Judge Bybee violated. The section of the report that includes the findings that pertain to Judge Bybee state only that the Bybee Memos did not present a "thorough, objective, and candid view of the law." Report at 255-57. That mantra is repeated throughout the report without reference to a specific rule. It certainly appears that OPR is relying on D.C. Rule 2.1, because that rule is identified in the section discussing professional standards. *Id.* at 21-23. Then again, the report also references the "Duty of Thoroughness and Care" under D.C. Rule 1.1, which OPR cites as "*[r]elevant to* Rule 2.1's duty to exercise independent professional judgment and render candid advice." *Id.* at 22. This leads to analytical confusion that the D.C. rules do not permit. If OPR is contending that OLC's analysis was not sufficiently thorough, then it must establish that the terms of Rule 1.1 have been violated. Yet it never actually addresses that question. If it is contending that Rule 2.1 has been violated, then it needs to offer proof that conform to *Rule 2.1*'s terms, and not some other rule. OPR cannot just pick and choose terms it likes from different rules, cobble them together, and call it a duty to give "thorough, objective, and candid" advice. Yet that is precisely what OPR has done.

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[31] All rule citations are to the D.C. Rules of Professional Conduct unless otherwise noted. Rules 1.1, 1.4, and 2.1 are attached at Appendix 10.

The D.C. Rules foreclose this hybrid approach and instead require violations to be established on a rule-by-rule basis. Rule 6.3,[32] which governs notices of Informal Admonition, requires Bar Counsel to "recite the misconduct in summary form and *specify the disciplinary rule or rules that respondent violated*." Rule 7.1 states that if Bar Counsel institutes formal contested disciplinary proceedings by filing a petition with formal charges, the petition must clearly and specifically inform the attorney of "the alleged misconduct and *the disciplinary rule or rules alleged to have been violated*." Rule 11.5 states that "[b]ar counsel shall have the burden of proving violations of *disciplinary rules* by clear and convincing evidence," and Rule 17.3 requires that the petition for negotiated discipline contains, *inter alia*, a stipulation of facts and charges, including *citation to the Rules of Professional Conduct that respondent has violated.*

OPR's own published standards require equal clarity. The standards provide that a referral must be based on the violation of "unambiguous" duties that are "unambiguously" applicable to an attorney's conduct. *See* U.S. Dep't of Justice, Office of Prof'l Responsibility, *Analytical Framework* ¶ B(3) (2005) ("OPR Analytical Framework") (Appendix 11) (explaining that "[a]n attorney intentionally violates an obligation or standard when he or she (1) engages in conduct with the purpose of obtaining a result that the obligation or standard *unambiguously* prohibits ...."); *id.* ¶ B(4) (explaining that "[a]n attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows, or should know based on his or her experience and the *unambiguous* nature of the obligation or standards, of an obligation or standard, (2) the attorney knows, or should know based on his or her experience and the *unambiguous* applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate or cause a violation of the obligation or standard, and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances.").

Second, in D.C., like other jurisdictions, violations of the specific rules of professional misconduct must be proven by clear and convincing evidence. *See In re Douglass*, 859 A.2d 1069, 1071 (D.C. 2004); *see also In re Discipline of Schaefer*, 25 P.3d 191, 204 (Nev. 2001); *Noojin v. Ala. State Bar*, 577 So. 2d 420, 423 (Ala. 1990). OPR has not even purported to find "clear and convincing evidence" of a reckless violation of whatever rules it has in mind. It has conceded that its findings are based solely on a "preponderance of the evidence standard." Report at 13. OPR acknowledges this failing (*id.* at 13 n.13), but nonetheless asserts that the preponderance of the evidence standard is appropriate because that is the standard required for current Department of Justice employees who are subject to departmental discipline. That rationale makes no sense where, as here, Judge Bybee is a former employee who is only subject to discipline by the D.C. Bar. It is highly inappropriate to make a referral when it is apparent that the governing standard of proof can not be met and the D.C. Bar will have far less access to evidence than OPR. There is certainly nothing in the OPR Standards that would have prohibited

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[32] All rule citations in this paragraph are to the D.C. Board on Professional Responsibility Rules.

OPR from finding that the evidence was "clear and convincing." It did not do so because even OPR could not pretend it was true. Thus, OPR has implicitly conceded that its conclusions do not, and could not, support a finding of misconduct in D.C. A referral to the D.C. Bar is accordingly wholly unwarranted and entirely improper—equivalent to violating Rule 11 by knowingly filing a complaint with insufficient evidence to meet the governing standards.

2. OPR's findings are impermissibly predicated on aspirational guidelines written long after the conduct at issue.

OPR asserts that the "legal standards" that "apply to OLC attorneys" are not limited to the "rules of professional responsibility" because OLC attorneys also "must adhere to the well-established principles that were described in [OLC's] own Best Practices Memo," a memo issued by Steven Bradbury in 2005. Report at 16. This was not merely an off-hand comment. OPR actually relies on the Best Practices Memo as a key source of Judge Bybee's alleged duty to "identify any counter arguments" in the Bybee Memos. *Id.* at 24. OPR also cites "Principles to Guide the Office of Legal Counsel," a document drafted in 2004 by former attorneys at OLC, as a relevant source for defining OLC's duties. *Id.* at 16, 22; *see* Walter E. Dellinger, Dawn Johnsen et al., *Principles to Guide the Office of Legal Counsel* 5 (Dec. 21, 2004) ("OLC Guidelines"). Neither document establishes minimum ethical standards that govern proof of a violation of the D.C. Rules of Professional Conduct.

Even OPR's own Analytical Framework forecloses reliance on these documents. The Framework states that DOJ lawyers must adhere to three types of Department policies: (1) "regulations issued by the Department and codified in the Code of Federal Regulations"; (2) "regulations codified in the Code of Federal Regulations and applicable to Department employees as well as other Executive Branch employees," and (3) "Department policies contained in the United States Attorney's Manual." *See* OPR Analytical Framework ¶ B(2). Neither the OLC Guidelines nor the Best Practices memo falls into any of these three categories. That should be dispositive, but even if it were not, neither establishes duties that governed Judge Bybee's conduct.

The OLC Guidelines were not even written until December 21, 2004—more than two years after the Bybee Memos were authored, and more than a year and a half after Judge Bybee left the Department. OPR's Analytical Framework states that an "essential" element to any conclusion that an attorney committed professional misconduct is "that the attorney violated or disregarded an *applicable* obligation or standard." *Id.* ¶ B(1). A document prescribing standards that did not exist at the time of the conduct at issue cannot, by definition, be "applicable" to that conduct. Moreover, the OLC Guidelines in no way established Department policy because it was not authored or signed by anyone within in the Department. Rather, the document was "prepared" and "endorsed" by nineteen *former* Assistant Attorneys General, Deputy Assistant Attorneys General, and Attorney Advisors from the Clinton Administration and was issued just a few months after the Bybee Memo was leaked to the press.

Bradbury's Best Practices Memo was at least written by an official of the Department. Nonetheless, it cannot be the governing source of Judge Bybee's duties. The Best Practices Memo was issued on May 16, 2005—nearly three years after the Bybee Memos. Moreover, the author has authorized us to represent that it was never intended to establish minimum standards for OLC (as the name "best practices" implies). Although the memo states that the recommended practices generally reflect the traditions of the office, Bradbury never intended it to serve as a basis for attorney discipline. In particular, Bradbury authorized us to represent that the statement that OLC opinions should strive to provide "a balanced presentation of arguments on each side of an issue" was an "aspirational" guideline that did not reflect historic OLC practice. He confirmed that many past OLC opinions provide little to no discussion of counter-arguments. OPR should have talked to the author and read past OLC opinions before relying on this supposedly unambiguous "duty" to conclude that Judge Bybee engaged in a reckless violation of ethical standards.

3. OPR impermissibly imposed a heightened standard on OLC attorneys issuing opinions about torture

OPR seems to understand that its conclusions could not withstand scrutiny under the voluminous body of disciplinary law so it tries to pretend that special heightened standards are in play here. *See, e.g.*, Report at 11, 17, 24-25. OPR's efforts to gerrymander the standards for officials of a past Administration who authorized controversial policies should be rejected.

First, OPR reasons that "OLC's duties are heightened because many of its opinions will never be reviewed by a court or disclosed publicly and are made outside of an adversarial system where competing claims can be raised." *Id.* at 17. This just plain contradicts federal regulations.

Federal law provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, *to the same extent and in the same manner as other attorneys in that State*." 28 U.S.C. § 530B(a). The regulation that implements §530B clarifies that "[s]ection 530B imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but *should not be construed to impose greater burdens on Department attorneys than those on non-Department attorneys*." 28 C.F.R. § 77.1(c). In addition, the regulatory preamble confirms that "Department attorneys face obligations similar to, *but not greater than*, those faced by non-Department attorneys." 64 Fed. Reg. 19,273, 19,274 (Apr. 20, 1999); *see also id.* ("The Department has concluded that section 530B does not authorize state authorities to impose stricter rules on Department attorneys than on other attorneys and in no way alters prevailing state and federal court rules of ethical conduct that provide exceptions for the conduct of government attorneys."). In other words, the federal regulations unquestionably ensure that no heightened standard applies to OLC attorneys despite OPR's findings to the contrary.

Second, OPR explains that the "analytical approach" it took in the report "*began with the premise*" that "the right to be free from official torture" is a "norm of *jus cogens*" under international law. Report at 24. As a consequence, OPR "determined that Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standards of professional conduct." *Id.* at 25. This is a nice try for stacking the deck based on OPR's perspective of the issue. But surely OLC does not have to meet any higher standard of conduct for issuing an opinion that finds that proposed techniques would not be torture under U.S. law than for issuing an opinion concluding that they would constitute torture. After all, OLC was told that many innocent Americans could lose their lives in a second wave of threatened attacks if the interrogation techniques could not be used. Surely OLC owed as much care in determining the scope of lawful measures that could be used to protect Americans who would be murdered by al Qaeda as it did in determining whether terrorists could lawfully be subjected to harsh interrogation techniques. This was unquestionably a matter that required great care, but not because of international law norms. Year in and year out, OLC is asked to answer questions with grave consequences for the nation. This was one of many such issues and cannot be singled out for a special standard of care. Indeed, federal appellate courts have routinely refused to apply a heightened standard of care like the one OPR adopts here even when counsel's client faces the death penalty if his efforts are inadequate. Surely hardened terrorists such as Abu Zubaydah, intent on killing innocent Americans, are not entitled to greater care from DOJ lawyers who did not represent him than capital defendants.

B. OPR Improperly Disregards Controlling Interpretations of the Duties of Competence, Communication, Independence, and Candor

By creating its own blended standard of professional conduct, OPR excuses itself from the obligation to reference controlling precedents. This will not do. It is apparent that OPR's complaints rise and fall on the view that the memos did not fully and fairly present opposing views and were "drafted to provide the client with a legal justification for an interrogation program that included the use of certain EITs." Report at 226. Three rules are potentially relevant to that theory: (1) the duty of competence governed by Rule 1.1; (2) the duty to communicate with the client governed by Rule 1.4(b); and (3) the duty to exercise independent, candid judgment governed by Rule 2.1. Although OPR only refers to two of them, none supports its view.

1. OPR fails to recognize that the standards governing "thoroughness" are defined by Rule 1.1 and are satisfied through diligent efforts to reach a sound conclusion

OPR's interpretation of the duty of "thoroughness" rests on several fundamental errors.

First, OPR seems to believe that the duty of "thoroughness" is imposed by the duty to provide candid professional judgment in Rule 2.1, and not constrained by principles developed under Rule 1.1. (Otherwise, OPR's failure to cite a single Rule 1.1 disciplinary case would be completely inexcusable since they are legion in number.) As Professor Hazard explains, OPR is wrong. If a lawyer's efforts and communications are sufficient to satisfy his duties of competence under Rule 1.1 and 1.4(b) then he *a fortiori* satisfies his duty to provide professional candid judgment under Rule 2.1 as long as the advice reflects his honest assessment. Hazard Letter ¶ 15.

Neither the language of Rule 2.1 nor its attendant comments refer to the thoroughness of an attorney's analysis or preparation and neither suggests that the rule imposes any additional duties of thoroughness beyond those established in other rules. In fact, the comments to Rule 2.1 merely require an attorney to "put advice in as acceptable a form as honesty permits." Rule 2.1, cmt. [1]. In stark contrast, thoroughness is an express element of counsel's duty of competence under Rule 1.1. That rule states that a lawyer must provide "competent representation" comprised of "legal knowledge, skill, *thoroughness* and preparation." In addition, we have discovered no Rule 2.1 case law that assesses thoroughness in the context of a lawyer's duty of candor. But the case law assessing an attorney's thoroughness in evaluating his duties under Rule 1.1 is ubiquitous.[33]

Second, OPR has chosen to assess "thoroughness" in a manner forbidden by Rule 1.1 and settled D.C. law. Here is how OPR describes the "analytical approach" that it used to assess "thoroughness and care": OPR reviewed "the legal arguments and conclusions the authors presented" and examined them in light of the "legal authority underlying [those] arguments" as supplemented by OPR's own "independent research." Report at 24. In other words, OPR has based its analysis and conclusions on an assessment of its view of the quality of the legal analysis set forth in the Bybee Memos. This is further confirmed by OPR's explanation that it identified "flaws" in the memos that consisted of "errors, omissions, misstatements, and illogical conclusions." *Id.* at 159. Although OPR asserts that it "did not base [its] findings on whether the Bybee and Yoo Memos arrived at a correct result," it nonetheless explicitly relied on its assessment of the quality of the analysis that led to those conclusions. *Id.* at 160. It pointedly *did not* predicate its conclusions on a finding that the OLC lawyers violated Rule 1.1 by falling below the standards of care for diligently researching and analyzing the relevant law when developing the basis for their conclusions.[34]

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[33] *See, e.g., People v. Boyle,* 942 P.2d 1199 (Colo. 1997) (attorney violated Rule 1.1 for failing to prepare adequately for hearing or to discover readily available evidence supporting asylum petition); *People v. Felker,* 770 P.2d 402 (Colo. 1989) (lawyer who prepared in car on way to courthouse for hearing on permanent orders in marital dissolution case, failed to seek maintenance and support arrearages, equitable division, or attorneys' fees or expenses, and failed to consult with client concerning agreement to limit child support violated Rule 1.1); *In re Mekler,* 689 A.2d 1171 (Del. 1996) (failure to check for conflicts of interest before accepting case violated Rule 1.1); *In re Guy,* 756 A.2d 875 (Del. 2000) (lawyer who failed to contact any of four potential defense witnesses named by his client in criminal case violated Rule 1.1); *In re Zimmerman,* 19 P.3d 160 (Kan 2001) (plaintiff's lawyer in a personal injury action did not hire expert witness to examine product involved in client's injury even after product was recalled and then failed to respond to motion for summary judgment); *Attorney Grievance Commission v. Chasnoff,* 783 A.2d 224 (Md. 2001) (finding violation of Rule 1.1 when plaintiff's lawyer in personal injury suit did not visit scene of accident until two years after the fact, did not attempt to locate employee who tried to help client on night of accident, did not attempt to preserve testimony of witnesses, and did not have a client monitor his medical condition to document lack of improvement); *Attorney Grievance Commission v. Middleton,* 756 A.2d 565 (Md. 2000) (concluding that lawyer representing rape defendant violated Rule 1.1 by not filing any discover requests and making no effort to obtain discoverable information from state's file); *Collins ex. rel. Collins v. Perrine,* 778 P.2d 912 (NM 1989) (lawyer violated Rule 1.1 by recommending settlement of medical malpractice case without doing sufficient legal or medical research and without consulting treating physician); *In re Kovitz,* 504 N.Y.S.2d 400 (N.Y. App. Div. 1986) (lawyer failed to investigate personal injury case for fourteen years, claiming it was a trial tactic to outwait witnesses); *Toledo Bar Ass'n v. Wroblewski,* 512 N.E.2d 978 (Ohio 1987) (lawyer for estate did not properly complete inventory and made no attempt to determine if any next of kin survived); *In re Greene,* 557 P.2d 644 (Or. 1976) (lawyer who was personal representative of estate did not ask relatives about assets and did not ascertain value of realty owned by estate); *In re Winkel,* 577 N.W.2d 9 (Wis. 1998) (lawyer failed to obtain information concerning trust funds held by clients' business, including amounts of deposits and disbursements made and claims of contractors on funds, before client surrendered assets to bank); *In re Fischer,* 499 N.W.2d 677 (Wis. 1993) (lawyer signed, as attorney of record, complex pleadings forwarded to him by the American Constitutional Coalition Foundation, which processed complaint from inmates challenging their incarceration; lawyer made no attempt to ascertain basis for their claims and made no assessment of documents).

[34] OPR finds that there were some deficiencies in research and analysis but does not ever conclude that the OLC lawyer's overall diligence and attentiveness to the matter fell below the standard of competence.

OPR apparently did not read the D.C. Court of Appeals decision in *In re Stanton*, 470 A.2d 281 (1983), even after Judge Bybee called it to OPR's attention in his response to the Draft Report. *See* Bybee Draft Response at 7, 23, 59, 84. In *Stanton*, the D.C. high court adopted the findings of the Board on Professional Responsibility ("the Board"), which concluded that the quality of a lawyer's legal opinion has virtually no role to play in determining whether the attorney committed professional misconduct. 470 A.2d at 287. At issue was the decision of the respondent attorney to urge his client to refuse a plea bargain offered by the government. In determining whether the attorney had engaged in disciplinary violations in connection with this advice, the Hearing Committee took into account its view that counsel's judgment about the merits of the offer was not so "far fetched as to justify a finding of 'neglect'." *Id.* The Board did not disagree with that assessment, but found that the decision should not be based on "the reasonableness of [counsel's] views." *Id.* The opinion explains that "[a] lawyer is duty-bound to exercise his best professional judgment on behalf of his client" and that a disciplinary board should "[n]ever be in the business of assessing the correctness of the lawyer's advice to his client" except "where *total inattention or incompetence* is made out on the part of the lawyer in reaching the decision." *Id.* The opinion emphasized that "[o]therwise, we put ourselves in the position of a sort of court of appeals from lawyers' judgments" and that "[a]ny attempt on our part to do so would be the *worst sort of second-guessing or Monday morning quarterbacking*." *Id.*

The comments to Rule 1.1 and D.C. precedents applying the rule support the same conclusion. Comment 5 explains that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem"; the "use of methods and procedures meeting the standards of competent practitioners"; and "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Each of the factors is directed to the level of counsel's diligence in reaching his judgments and not the quality of his reasoning. Consistent with this emphasis on diligence, we have found no Rule 1.1 case that involves remotely analogous conduct to that at issue here. Instead, violations of Rule 1.1 in D.C. are generally confined to blatant procedural defaults such as failing to file or perfect an appeal, *In re Drew*, 693 A.2d 1127, 1127 (D.C. 1997); *In re Sumner*, 665 A.2d 986, 986 (D.C. 1995), or failure to follow other clear rules, *In re Starnes*, 829 A.2d 488, 504, 506 (D.C. 2003) (finding violation of Rule 1.1(a) and (b) where counsel failed to file a docketing statement and failed to file a change of address form). *See also In re Lyles*, 680 A.2d 408, 416 (D.C. 1996) (finding violation of Rule 1.1(b) where counsel held himself out as a bankruptcy lawyer and failed to follow the Bankruptcy Rules); *In re Spaulding*, 635 A.2d 343, 344 (D.C. 1993) (finding incompetence where the lawyer failed to comply with discovery deadlines and let the time for certiorari pass without filing a petition).

To be sure, there can be some limited overlap between the assessment of counsel's diligence and the content of his advice. The failure to find controlling adverse precedent certainly provides some evidence of insufficient diligence, but the focus of the inquiry is on the methods and efforts of counsel, not the substantive advice. This is further illustrated by a recent decision of the Virginia Supreme Court. In *Barrett v. Virginia State Bar ex rel. Second District Committee*, 634 S.E.2d 341, 347 (Va. 2006), the Court held that discipline under Rule 1.1 is "not justified based on research that results in the wrong legal conclusion because incorrect legal research alone, although attorney error, *is not clear and convincing evidence of incompetence* for purposes of that Rule." In *Barrett*, the court reversed a finding of incompetence against an attorney who had failed to file a client's personal injury lawsuit within the limitations period, failed to read responsive pleadings in a timely manner, and delayed withdrawing a special plea of immunity in his client's resulting malpractice case. *Id.* Despite the concrete prejudice suffered by the client, the court refused to find that the attorney had violated the rules of professional conduct because "research that results in the wrong legal conclusion" is "attorney error" but not incompetence. *Id.* Thus, even if an attorney's ultimate conclusion is incorrect and prejudices his client, these facts alone do not constitute an ethical violation.

Third, to the extent the quality and thoroughness of the analysis reflected in the opinions has a bearing on the assessment of OLC's competence, the inquiry would be informed by principles of judgmental immunity, which OPR also ignores. Findings of incompetence are impermissible when counsel has provided an opinion on an unsettled question of law that is not wholly unreasonable. As the D.C. Court of Appeals recently explained, a lawyer's advice cannot be deemed to fall below the standard of care for competence "if 'reasonable attorneys could differ with respect to the legal issues presented'" because "'the second-guessing after the fact of ... professional judgment [i]s not a sufficient foundation'" for a negligence action, let alone an ethical violation. *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 668 (D.C. 2009) (citation omitted).[35]

Biomet was a malpractice decision, but its reasoning plainly informs the proper interpretation of the duties of thoroughness and competence established in Rule 1.1, as Professor Hazard confirms. *See* Hazard Letter ¶ 9. In *Biomet*, the D.C. high court examined whether counsel had satisfied its duty to use "a reasonable degree of knowledge, care, and skill," and expressly referenced D.C. Rule 1.1. 967 A.2d at 665. The Court reviewed the history of the judgmental immunity doctrine and emphasized that "[i]t has long been recognized" that "mistakes made in the honest exercise of professional judgment" do not fall below the standard of care for competent advice. *Id.* It emphasized that the "acceptance of the judgmental immunity principle" is so "widespread" that the Sixth Circuit had noted that "neither counsel nor we have found an American decision" that ever found that an attorney violated the requisite standard of care based on "the good faith exercise of professional judgment." *Id.* at 665-66 (quoting *Woodruff v. Tomlin*, 616 F.2d 924, 930 n.1 (6th Cir. 1984)). Despite this precedent, OPR makes no finding that the advice at issue here did not reflect the "honest" views of Judge Bybee or John Yoo, nor any finding that "reasonable attorneys could [not] differ" on the questions answered in the Bybee Memos.

Fourth, OPR was required to assess the Bybee Memos with reference to the "skill and care commensurate with that generally afforded to clients by other lawyers in similar matters" under Rule 1.1, but inexplicably determines that the fact that many other Executive Branch lawyers "concluded that the CIA's use of EITs was lawful was *not relevant* to [its] analysis." Report at 160. Given that the rule expressly demands a comparison to "other lawyers in similar matters," what could be more "similar" than the determination by "other [Executive Branch] lawyers" that the proposed techniques did not violate the torture statute? As Professor Hazard confirms, this evidence was unquestionably relevant to an assessment of a disciplinary violation and OPR was required to consider it. Hazard Letter at ¶ 6. *Cf. State v. Carnail*, No. 78143, 2001 WL 127749, at *4 (Ohio Ct. App. Feb. 15, 2001) ("[T]he fact that the same advice was given by an another attorney supports the [conclusion] that [defense] attorney's advice and conduct regarding the plea fell within the wide range of reasonable professional assistance."); *State v. Price*, No. 19722-7-II, 1996 WL 740847, at *2 (Wash. Ct. App. Dec. 30, 1996) (rejecting ineffective assistance of counsel claim where defendant received the same advice from both attorneys he consulted).

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[35] *See also Robinson v. Southerland*, 123 P.3d 35, 43 (Okla. Civ. App. 2005); *Meir v. Kirk, Pinkerton, McClelland, Savary & Carr, P.A.*, 561 So. 2d 399, 402 (Fla. Dist. Ct. App. 1990) (because timing of statute of limitations period was debatable point of law, attorney's judgment was immune from malpractice claim); *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 818 (Minn. 2006) (an attorney is not liable for an error of judgment or mistake in a point of unsettled law); *Baker v. Fabian, Thielen & Thielen*, 578 N.W.2d 446, 451-52 (Neb. 1998) (attorney's judgment or recommendation on unsettled point of law is immune from liability); *Roberts v. Chimileski*, 820 A.2d 995, 998 (Vt. 2003) (judgmental immunity doctrine protects attorneys from liability where they advised client about development scheme, the legality of which was unsettled at the time advice was given).

It is bad enough that OPR failed to recognize the relevance of this highly exculpatory evidence. What is worse is that it repeatedly relies on subsequent criticisms of portions of the memos as support for its findings. It opens the report with criticisms by human rights activists who unsurprisingly called the Bybee Memos "blatantly wrong" (Report at 2-3), and peppers its findings with select criticisms from later OLC lawyers *who agreed with the core conclusions. See, e.g., id.* at 112, 160, 179. OPR is more than willing to find that criticisms of select portions of the analysis are relevant to a finding of misconduct, but when it encounters agreement with OLC's conclusion that "the use of EITs was lawful," it deems it "[ir]relevant"? What is going on here?

Finally, OPR refuses to give any weight whatsoever to the fact that core portions of the Bybee Memo's analysis have been vindicated by decisions of the federal courts of appeals. It reasons that "cases decided after issuance of the Bybee ... Memos" are "not relevant to whether the OLC attorneys present a thorough" analysis of the law in 2002. *Id.* at 175 n.132. If OPR is going to assess the duty of thoroughness through reference to the quality of OLC's legal analysis then it certainly is duty bound to give OLC credit for accurately predicting the judgments of the federal courts. Once again, Professor Hazard confirms the obvious relevance of these precedents. Hazard Letter ¶ 7. In sum, OPR's findings that the Bybee Memos failed to meet the standards for "thoroughness" set forth in Rule 1.1 cannot possibly be upheld because they were not made in accordance with the governing law of ethics.

2. OPR fails to recognize that the duty to communicate risks to the client is defined by Rule 1.4(b) and does not mandate discussion of all counter arguments

OPR's core concerns have nothing to do with the actual thoroughness of the work OLC did to form its conclusions. Its real focus is on the "thoroughness" of OLC's discussion of counter-arguments. It repeatedly contends that the memos have "omissions" that would lend support to a contrary view. Report at 160, 174, 192-93, 204, 209, 235. And it expressly concludes that there is a duty to prepare opinion letters that include a "thorough discussion of the law" setting forth "the strengths and weaknesses of the client's position" and that "identif[ies] any counter arguments." *Id.* at 24. While the law does impose a duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," that duty is established by D.C. Rule 1.4(b) and it has never been interpreted to require counsel to write "a brief for the opposing view." Hazard Letter ¶ 11. OPR cites no contrary authority and has failed to make findings that conform to the standards set forth in Rule 1.4(b), which govern the adequacy of counsel's communications about the risks associated with his advice.

First, given the obvious relevance of the text of Rule 1.4(b) to the issues that OPR is addressing, it is quite curious that OPR ignores it entirely. Either it failed to read the D.C. rules "thoroughly," or it recognized that it could not fit its duty to disclose all counter-arguments into the text of the rule, so just ignored it. But this is the rule that governs the "adequacy of communication" with the client and establishes the "guiding principle[s]." Rule 1.4(b) cmt. [3]. Thus, OPR's lament that the memos did not tell the CIA about arguments that could be made on the other side (*e.g.*, Report at 235, 236), falls squarely within the subject addressed by this rule.

But there is not a hint anywhere in the text of the rule, its comments, or in the case law that would require counsel to provide its advice in the form of an opinion letter that discusses all potentially adverse arguments and authorities. To the contrary, Rule 1.4(b) provides that counsel's duty is to "explain" the advice "to the extent reasonably necessary to permit" an "informed decision" and that the "guiding principle" is to "fulfill reasonable client expectations for information" consistent with "*the client's* best interests and ... [its] overall requirements and objectives." Rule 1.4(b) & cmt. [3]. Yet OPR never even attempts to measure the adequacy of the disclosures at issue here in light of the CIA's ability (or that of the White House) to make an "informed decision" or its "expectations for information" or its "overall requirements and objectives." *See* Rizzo Letter ¶ 1 (Rizzo "did not ask OLC to provide an exhaustive memorandum that thoroughly discussed all possible counterarguments").

Second, none of the authorities OPR cites purports to establish an ethical duty to "thoroughly" discuss arguments in opposition to counsel's honest legal judgment. OPR's legal analysis in support of its recognition of this duty consists of a single paragraph in the report (at 24). This paragraph does not cite the language of any disciplinary rule or comments. It does not cite any cases. Indeed, it does not cite any ethics authorities whatsoever. All it cites are two books on legal research and writing and the OLC Best Practices Memo. The fact that books on legal research and writing might recommend a discussion of counterarguments in legal memos has nothing to do with counsel's ethical duties when rendering opinions.

As for the Best Practices Memo, it does say that OLC should strive "in general" to write opinions that include a "balanced presentation of arguments on each side of an issue ... taking into account all reasonable counter arguments." Report at 24 (quoting Best Practices Memo at 3). But as set forth, *supra* Section III.A.2, the author of the Best Practices Memo expressly confirmed that this practice was only aspirational and most certainly had not been the long-standing custom of the office. As described below, OLC files are filled with opinions that do not begin to meet this standard. OPR could not possibly have read OLC opinions before adopting this mandatory ethical duty and using it here to make findings of misconduct against Judge Bybee. And expressing counter arguments surely did not represent an "unambiguous" duty in August of 2002—more than two years before the guidance was even drafted—as required by OPR's own governing standards.

As Professor Hazard explains (Hazard Letter ¶¶ 10-14), it would be thoroughly impractical to impose such a duty on counsel preparing opinions. Clients often want their counsel's best judgment and not a treatise on the law. *See* Rizzo Letter ¶ 1 ("When [Rizzo] asked for OLC's views, [his] overriding objective was to secure a definitive opinion on an expedited basis."). Yes, clients need to know whether the position poses risks. But that information can be communicated without writing the dissenting opinion. And with sophisticated clients, they often know that the issue is uncertain by the time they request the opinion. *See id.* (Rizzo was "aware that the issues were uncertain and that there were no controlling precedents"). The lawyer does not have to print a disclaimer in bold saying that a court might resolve the question a different way. That is inherent whenever counsel gives advice on unsettled questions of law. Clients often cannot afford the time or money for a "thorough" discussion of all opposing arguments. In OPR's view, counsel would violate the rules of ethics if it gave the clients what they wanted.

A simple survey of Attorney General and OLC precedent (which OPR studiously ignores) makes clear that the executive branch attorneys have *never* been required to provide an extensive written opinion detailing all possible counterarguments, disclosing every conceivable risk to the client, and citing every case arguably on point—even on indisputably weighty matters.[36] Indeed, the Department often states its opinion in conclusory and confident fashion or elects to memorialize only the most important portions of that advice.[37]

For example, President Andrew Johnson's Attorney General wrote one of the shortest opinions on record (28 words): "Sir: I am of the opinion that the persons charged with the murder of the President of the United States can rightfully be tried by a military court." Luther A. Huston, *The Department of Justice* 26 (1967). Much later, in 1940, during World War II, Attorney General Jackson was similarly curt with a two-page opinion interpreting a selective service statute, the analysis of which consisted of a *single conclusory paragraph. Registration of Aliens Under Selective Training and Service Act*, 39 Op. Att'y Gen. 504, 505 (Oct. 11, 1940). No contrary views were presented. Not a single court case was cited. Similarly, in 1990, Attorney General Barr confidently concluded, in a two-page opinion, that the President had the authority as Commander-in-Chief to commit U.S. troops to Somalia for humanitarian assistance without Congressional approval. *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6 (Dec. 4, 1992). He considered no judicial precedent and no counterarguments. And, in 1995, Deputy Assistant Attorney General Shiffrin concluded in a four-page opinion that a legislative provision prohibiting President Clinton from placing U.S. troops under U.N. control would unconstitutionally infringe on the Commander-in-Chief authority and that an attempt to prevent the President from using antipersonnel mines would be constitutionally problematic. Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act*, at 1 (Sept. 15, 1995) ("*Shiffrin 1995 Opinion*") (Appendix 14). Even on such weighty matters, Shiffrin only needed to employ limited analysis, did not disclose all possible counterarguments, and did not cite all potentially-relevant cases (such as *Youngstown*). These are but a few of the many examples demonstrating that OPR's purported standard plainly cannot be the law.

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[36] *See, e.g., Shiffrin 1995 Opinion* (four-page opinion providing very little analysis in holding legislation unconstitutional under Commander-in-Chief clause); *Constitutionality of Health Care Reform*, 17 Op. O.L.C. 124, 126-27 & nn. 6-9 (Oct. 29, 1993) (Dellinger) (rejecting Tenth Amendment challenge to sweeping health care bill without considering recent landmark decision in *New York v. United States* (1992), instead relying on case law from 1937); *President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas*, 41 Op. Att'y Gen. 313, 314, 326, 329 (Nov. 7, 1957) ("Little Rock Opinion") (addressing "grave constitutional issues" and holding that the President had "undoubted power" to send troops to restore law and order in the states, notwithstanding the Posse Comitatus Act, even though there was "no judicial decision on this question").

[37] Little Rock Opinion at 332 (noting that the written opinion is merely "the *more significant* aspects of my advice"); Hazard Letter ¶ 11 (noting that, in the Eisenhower administration, one lawyer simply advised: "Resign immediately and in writing.").

Third, case law interpreting Rule 1.4(b) sets a high bar governing the materiality of information that must be disclosed on pain of disciplinary sanctions. Because the duty is expressly designed to ensure that a client can make an "informed decision," counsel has no duty to impart information that the client already has or that is not likely to alter the client's decision. For example, in *In re Thonert*, the Indiana Supreme Court found that an attorney violated Rule 1.4(b) when the attorney counseled his client to pursue an appeal of a DWI conviction but "fail[ed] to apprise his client of a ruling in the *controlling* jurisdiction that was adverse to the legal arguments contemplated for his client's case on appeal, and instead cho[se] only to advise the client of an earlier appellate decision favorable to his position." 733 N.E.2d 932, 934 (Ind. 2000). The Indiana Supreme Court held that the attorney "effectively divested his client of the opportunity to assess intelligently the legal environment in which his case would be argued and [impeded his client's ability] to make informed decisions regarding whether to go forward with [the appeal]." *Id.* OPR does not assess the "omissions" from the Bybee Memos under this standard because it mistakenly concluded that the duty of "thoroughness" extends to "any counterarguments." Report at 24.

Fourth, the nature of the disclosures that are required are measured by the client's sophistication in legal matters as well as an assessment of its overall objectives. The D.C. Rules of Professional Conduct, ABA Standing Committee opinions, the Restatement (Third) of the Law Governing Lawyers, and case law all uniformly confirm that the level of a client's sophistication is relevant in assessing whether an attorney's conduct violated his ethical obligations. *See, e.g.*, Rule 1.0 (Terminology) cmt. [2] ("In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is *experienced in legal matters generally* and in making decisions of the type involved...."); Rule 1.7 (Conflict of Interest) cmt. [28] ("Lawyers should also recognize that the form of disclosure sufficient for more *sophisticated* business clients may not be sufficient to permit less *sophisticated* clients to provide informed consent."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-425 at 5 (2002), *Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims* (Feb. 20, 2002) (noting that Rule 1.4(b) requires lawyers to explain the implications of binding arbitration provisions in attorney-client contracts and stating that "[d]epending on the sophistication of the client and to the extent necessary to enable the client to make an 'informed decision,' the lawyer should explain the possible adverse consequences as well as the benefits arising from execution of the agreement").

The Restatement (Third) of the Law Governing Lawyers—also demonstrates that OPR did not identify or apply the relevant factors. Comment c to Section 20 explains that an assessment of a lawyer's duty to inform "depends upon such factors as the ... *the client's* *sophistication and interest*" and comment e states that "[t]he lawyer ordinarily must explain the pros and cons of reasonably available alternatives" but that "the appropriate detail" depends on factors that include not only the importance of the decision, but also "how much advice the client wants," what "the client has already learned and considered," as well as "the time available for deliberation." *Id.* § 20, cmt. [2]. Those factors are highly relevant here, as the Rizzo Letter demonstrates beyond any doubt, but OPR gave them no consideration. Indeed, in *Jeansonne v. Attorney's Liability Assurance Society*, 891 So. 2d 721, 730 (La. Ct. App. 2004), the court upheld a finding that an attorney's "professional judgment as to the nature and extent of explanations and advice to his client cannot be challenged as a matter of law" where the attorney "exercised his professional judgment under circumstances where *his client was sophisticated and experienced.*"

In summary, OPR should have read and applied the standards set forth in D.C. Rule 1.4(b) instead of the one it found in a primer about legal writing.

3. OPR fails to recognize that the duty of candor is satisfied by counsel's "honest assessment" of the issues and that there is no duty of objectivity divorced from the interests of the client

D.C. Rule 2.1 imposes duties of "candor" and "independence" when rendering advice to clients. It is unclear precisely how OPR is defining these terms, but it is clear that OPR is not actually using the definitions established in the comments and case law.

First, the duty of candor requires proof that the advice did not reflect the lawyer's "honest assessment," yet OPR never applied this standard. Comment [1] to Rule 2.1 is explicit. It explains in no uncertain terms that the rule requires "straightforward advice expressing the lawyer's *honest assessment.*" Although OPR quotes the comment in full (at 21), OPR never again uses the term "honest assessment" or any equivalents such as a "good faith" belief in the advice. It instead finds that John Yoo violated his duty by knowingly providing "one-sided" advice. Report at 258. It never finds that John Yoo did not honestly believe the "side" he presented (and is supported in his views by the vast majority of the judges who have considered many of the key issues). And OPR finds that Judge Bybee violated a duty of candor even though OPR finds that he acted in good faith and did not even know that the advice was one-sided. *Id.* at 256.

As OPR acknowledges, its findings are not supported by case law under Rule 2.1. It notes that there is a "dearth of Rule 2.1 cases" and seems to think this means that a case like this one has just never arisen. *Id.* at 22. The fact that there has never been a disciplinary proceeding in D.C. finding a violation of Rule 2.1 should have caused OPR to understand that the rule does not prohibit "one-sided" opinions that reflect counsel's "honest assessment." Moreover, there are Rule 2.1 cases from other jurisdictions confirming that violations of this rule have been predicated on proof of deceit or bad faith. *See, e.g.*, *In re O'Connor*, 553 N.E.2d 481, 483-84 (Ind. 1990) (disciplining an attorney for, *inter alia*, a violation of Rule 2.1 for failure to render honest advice by lying to a client's family member about his efforts to get a client released from jail even though the attorney took no action to get the client released); *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255, 271 (Miss. 1988) (disciplining attorney for violating Rule

2.1's obligation to give "completely honest and straightforward advice" to a client because the attorney refused to inform client of a settlement offer). OPR must have missed them.

OPR also seems to have missed the most relevant portion of its own Analytical Framework. It likewise establishes that an attorney who acts in good faith does not commit professional misconduct. *See* OPR Analytical Framework at ¶ B(4). Although OPR references a variety of sections of its Framework (Report at 18-19), it forgets to mention that "[a]n attorney who makes a *good faith* attempt to ... comply" with his duties in a given situation "does not commit professional misconduct." *Id.* OPR nonetheless finds Judge Bybee guilty of misconduct while not contesting his good faith. *Id.* at 256. Even if thoroughness played a role in an assessment of an attorney's candor, OPR fails to explain how Judge Bybee could have violated that duty by failing to disclose something that OPR finds he did not know.

Second, Rule 2.1 imposes a duty of "independence" but OPR misconstrues this to mean a duty of "objectivity" divorced from the interests of the client. Applying this revised standard, OPR criticizes OLC because it was "aware of the result desired by the client" and then "drafted memoranda to support that result." *Id.* at 227. But there is nothing wrong with OLC knowing its clients' objectives or attempting to further them in good faith. Rule 2.1's duty of "independence" does not require indifference to the client's goals. In fact, even the OLC Guidelines recognize that "OLC *must* take account of the administration's goals and *assist in their accomplishment* within the law." OLC Guidelines at 5. Or as Professor Hazard puts it, counsel is not merely free to take his client's objectives into account, but "*should* do so." Hazard Letter ¶ 16. Numerous D.C. rules state this unequivocally.[38] So does the Model Code of Professional Responsibility, which affirmatively *requires* a lawyer to seek to meet his client's "objectives." *See* DR-7-101 (1983) (A lawyer "shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules").[39]

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[38] *See, e.g.,* Rule 1.3(a) ("A lawyer shall represent a client *zealously* and diligently within the bounds of the law."); Rule 1.3 cmt. [1] ("This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to *take whatever lawful and ethical measures are required to vindicate a client's cause* or endeavor. A lawyer should act with commitment and dedication to the interests of the client."); Rule 1.3 cmt. [6] ("In the exercise of professional judgment, a lawyer should always act in a manner consistent with *the best interests of the client.*"); Rule 1.4(b) cmt. [3] ("Adequacy of communication depends in part on the kind of advice or assistance involved. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) *the client's overall requirements and objectives as to the character of representation.*"); Rule 3.1 cmt. [1] ("The advocate has a duty to use legal procedure *for the fullest benefit of the client's cause....*"); Rule 3.2(b) ("A lawyer shall make reasonable efforts to expedite litigation consistent *with the interests of the client.*").

[39] Likewise, no cases suggest that there is ground for suspicion when attorneys agree with their clients, or are simply aware of the outcome desired by the client. Instead, courts have predicated violations of this standard based on conduct that compromises the professional relationship between the attorney and client, as in the case of inappropriate sexual relationships. *See, e.g., In re Ashy,* 721 So. 2d 859, 867 (La. 1998) (finding that attorney violated Rule 2.1 after attempting to develop a sexual relationship with a female client in exchange for making certain efforts on her behalf as her lawyer because "a lawyer who engages in a sexual relationship with a client,... risks losing the 'objectivity and reasonableness that form the basis of the lawyer's independent professional judgment'") (citation omitted); *In re Schambach,* 726 So. 2d 892, 895-96 (La. 1999) (finding that a sexual relationship between attorney and client impaired the lawyer's objectivity and independent professional judgment in violation of Rule 2.1); *In re Touchet,* 753 So. 2d 820, 823 (La. 2000) (attorney disbarred for violating Rule 2.1 after

Moreover, Goldsmith's submission to OPR noted that executive branch attorneys have repeatedly sought "to help the President achieve a vital national security goal in a time of crisis." Goldsmith Submission at 3. To illustrate his point, Goldsmith recounted a number of DOJ opinions supporting controversial Presidential decisions in history, including Attorney General Edward Bates's opinion supporting President Lincoln's decision to suspend habeas corpus during the Civil War, Attorney General Robert Jackson's opinion supporting FDR's decision to send destroyers to Great Britain in 1940, and the advice supporting President Kennedy's decision to quarantine Cuba during the Cold War. *Id.* at 2-3. These lawyers, Goldsmith continued, provided acceptable interpretations of the law, even though they were aggressive and "did not always give full play to contrary arguments or precedents." *Id.* at 3-4.[40]

Many recent occupants of the office have confirmed that Goldsmith's historical account remains true today. Judge Bybee, for example, told OPR that he saw it as his "responsibility as head of [OLC] ... to be a vigorous defender of the president's prerogative." Bybee Tr. at 54. Former Assistant Attorney General Timothy Flanigan similarly confirmed that OLC attorneys are "*almost always aware of the course of action the client wishes to take*" and that it is "perfectly appropriate for OLC attorneys to determine whether there is a legal way for the client to undertake such actions and to address particular issues that the client requests be considered as long as the advice they render reflects their best professional judgment." Flanigan Decl. ¶ 5. Dan Levin agrees. He confirms that "it is appropriate for OLC to determine whether there is a legal way for the client to undertake actions the client believes to be important for national security reasons." Levin Decl. ¶ 8. Jack Goldsmith concurs: "Having the political dimension in view means that OLC is not entirely neutral to the President's agenda. Especially on national security matters, I would work hard to find a way for the President to achieve his ends." Goldsmith, *The Terror Presidency* at 35. And Steve Bradbury similarly authorized us to represent that he shares the views of each of the preceding individuals that OLC has an affirmative duty to take into account its clients' objectives while presenting OLC's own honest assessment of the answer to questions posed. *See also* Best Practices Memo at 16 ("Before we

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lawyer made unwanted sexual demands on six female clients and solicited sexual favor in lieu of legal fees); *Disciplinary Counsel v. Sturgeon*, 855 N.E.2d 1221, 1225 (Ohio 2006) (court permanently disbarred attorney who attempted to solicit sexual favors from his client, stating that "lawyers must always exercise independent professional judgment and render candid advice to their clients" rather than "attempt[] to engage in a sexual relationship with a client"). In other words, merely being *figuratively* in bed with the client is not enough.

[40] Indeed, in pressing for (and receiving) Attorney General Jackson's approval of his plan to send destroyers notwithstanding the Neutrality Act in *Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers*, 39 Op. Att'y Gen. 484 (Aug. 27, 1940), the President even personally "*engaged in an extensive line-edit of Jackson's draft opinion*," David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 1045 (2008). More recently, in 1993 when OLC found no constitutional problems with President Clinton's far-reaching health care plan—one of his administration's signature issues—OLC undoubtedly knew the President's desired outcome. *Constitutionality of Health Care Reform*, 17 Op. O.L.C. 124 (Oct. 29, 1993) (Dellinger). That opinion puts on no airs of platonic "objectivity"—dismissing a Commerce Clause challenge because "*[f]ortunately*, the Supreme Court has long since rejected [such a] crabbed view"—even though such a sweeping overhaul affecting the well-being of millions of Americans and a significant portion of the U.S. economy is clearly a weighty matter demanding the highest advisory care. *Id.* at 125; *see also id.* at 124 (stressing that such challenges "should not be allowed in any way to deflect consideration of the merits of the President's proposal"). And this all makes sense, as the Attorney General has always been charged with giving "*his* advice and opinion" (28 U.S.C. § 511; *see* Judiciary Act of 1789, 1 Stat. 73), a duty that has, in turn, been delegated to OLC (*see* 28 U.S.C. §§ 510-513; 28 C.F.R. § 0.25(a)).

proceed with an opinion, our general practice is to ask the requesting agency for a detailed memorandum setting forth the agency's own analysis of the question").

It is accordingly quite inappropriate for OPR to define OLC's duty of "independence" (or "candor") in a manner that intrudes on this conception of the AAG's role. While some believe that OLC should serve as an impartial and neutral adjudicator, others do not. Former Chief Justice Rehnquist, for instance, rejected a view of the Department of Justice as a bureaucratic entity akin to a European Ministry of Justice. In his view, the Department had to articulate reasonable positions, but was not "required to take the one which would be most restrictive on its activities." *Nominations of William H. Rehnquist and Lewis F. Powell, Jr: Hearings Before the S. Comm. on the Judiciary*, 92nd Cong. 185 (1971). Then-Judge Alito has similarly noted the problems inherent with presuming too much independence on the part of OLC: "Neither the Attorney General nor OLC has independent constitutional authority; rather, they assist the President in carrying out his authority under Article II.... These factors suggest that an OLC opinion should not be ... attacked on the ground that OLC did or did not act 'independently.' OLC is really not like a court, despite the fact that it follows some quasi-judicial procedures and issues 'opinions.'" Samuel A. Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 Cardozo L. Rev. 507, 510 (1993); *see also* Eric A. Posner & Adrian Vermeule, *A "Torture" Memo and its Tortuous Critics*, Wall St. J., July 6, 2004, at A22 ("Posner & Vermeule") ("[F]ormer officials who claim that the OLC's function is solely to supply 'disinterested' advice, or that it serves as a 'conscience' for the government, are providing a sentimental, distorted and self-serving picture of a complex reality.").

OPR's conception of the duty of "objectivity" ignores OLC's unique institutional status and finds no support in the relevant rules or historical practice. It is not OPR's job to define OLC's mission. That responsibility rests with the President and the officials he nominates for the office.

C. OPR Intentionally Ignores Controlling Supreme Court Precedent Defining "Recklessness"

OPR predicates its misconduct finding against Judge Bybee on its determination that he was "reckless" when he failed to withhold the opinion on August 1 in order to do sufficient research to discover that the opinion was "incomplete" and "one-sided." Report at 256. OPR nevertheless does not apply the governing legal standards for proof of recklessness or make the requisite findings. To the contrary, although it fails to cite *a single case* relating to proof of recklessness, it declines to adopt the standards in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), for reasons that could not withstand a Rule 11 sanctions motion. OPR's conclusions against Judge Bybee cannot be upheld because it never identified or applied the correct standards.

First, OPR refuses to apply the standards established by the Supreme Court in *Safeco* for assessing the culpability of a firm that adopted a wrong interpretation of the law for one and only one reason: the statute at issue in *Safeco* "requires willfulness to establish civil liability" but the "definition of 'recklessness' under the OPR standard ... does not require willfulness." Report at 19 n.19. This footnote should embarrass OPR to high heaven. It could not have read the Supreme Court's decision and offered this distinction.

Even a quick reading of *Safeco* leaves no doubt that the recklessness standard at issue there and the one in OPR's rules are indeed one and the same. The Supreme Court squarely rejected counsel's arguments (like OPR's) that the term "willfulness" should not be equated with the civil "recklessness" standard. In *Safeco*, consumers brought a class action lawsuit against insurers alleging reckless violations of the Fair Credit Reporting Act ("FCRA"). The FCRA imposes civil penalties on persons who "willfully" violate consumer notice provisions of the Act. 15 U.S.C. § 1681n(a). The threshold question in the case was whether a "willful" violation required proof of "acts known to violate" the FCRA or only "reckless disregard of [the] statutory duty." *Safeco*, 551 U.S. at 56-57. The Court held that "reckless action is covered" by the civil liability provision because "the standard civil usage" of "willful" means "reckless." *Id.* at 52, 57. The Court supported its conclusion by quoting a treatise that explained that the terms "willful" and "reckless" have been "treated as meaning the same thing." *Id.* at 57 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Law of Torts* § 34, p. 212 (5th ed. 1984)).

If there were any doubt remaining (and there could be none), the Court then proceeded to resolve the case by assessing the culpability of the insurers' conduct solely with reference to the ordinary civil recklessness standard. The Court explained that it saw "no reason to deviate from the common law understanding" of the concept of "recklessness." *Id.* at 69. It accordingly used standard tort law definitions. It reasoned that "'the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" *Id.* at 68 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). Thus, the Court determined that "a company subject to FCRA does not act in *reckless disregard* of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69. Applying the common law definition of the term, the Court held that "Safeco's reading [of the statute] was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for *reckless* liability." *Id.* at 70. There accordingly can be no debate that the Court was interpreting and applying the civil recklessness standard in *Safeco, i.e.*, the standard adopted in OPR's guiding documents.

Second, if OPR had applied the prevailing standard for proof of civil recklessness, as explained in *Safeco*, it would have recognized that counsel's adoption of even plausible answers to unsettled questions of law cannot form the basis for a finding of recklessness. The Court held that *Safeco* was in violation of the law because it failed to send notices to new applicants based on an erroneous interpretation of the statute. *Id.* at 55. Nevertheless, the Court also determined that Safeco's conduct was not reckless as a matter of law (despite allegations of bad faith). *Id.* at 70. The Court explained that when there is a "dearth of guidance" on a particular legal issue, it would "defy history and current thinking" to find a legal interpretation to be reckless where it "could reasonably have found support in the courts"—that is, where the text and relevant precedent "allow for more than one reasonable interpretation." *Id.* at 70 & n.20.[41] In fact, the

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[41] The Solicitor General filed an amicus brief in support of Safeco, arguing that recklessness requires "an aggravated or extreme departure from standards of ordinary care" and that "more than mere unreasonableness or implausibility must be shown." Brief for United States as Amicus Curiae at 21-22. Thus, there is no recklessness in advancing a "colorable" (albeit ultimately incorrect) interpretation of the law. *Id.* at 22. The Solicitor General further argued that recklessness must be analyzed against an objective standard, taking into account "the extent to which the law was well-established and clearly understood." *Id.*

Court made clear that even some "unreasonable" interpretations would not be reckless because the interpretation had to be more than "careless." The judgmental immunity decisions discussed above, *supra* Section III.B.1, reach similar conclusions even in the context of negligence actions.

Third, OPR cannot even seem to settle on a consistent recklessness standard of its own. In its standards section, OPR asserts that "an attorney's disregard of an obligation is reckless when it represents a *gross deviation* from the standard of conduct that an objectively reasonable attorney would observe in the same situation." Report at 19. But then OPR never actually compares Judge Bybee's conduct to that of other similarly situated attorneys and makes a finding that his decision to sign the memos on August 1, 2002 represented a "gross deviation" from the standard. Had it done so, it would have discovered the numerous other officials who reached the same conclusions as Judge Bybee. *See supra* Section II.D. Far from being"[ir]relevant to [OPR's] analysis" (Report at 160), these concurrences offer significant proof that Judge Bybee's conduct did not represent a "gross deviation" from a reasonable standard of care.

As applied, OPR's notion of recklessness more closely approximates a standard of negligence. It asserts that "an attorney of Bybee's background and experience" "*should have* known that the memoranda were not thorough, objective or candid." Report at 256; *see also id.* (Judge Bybee "*should have* recognized and questioned the unprecedented nature of the Bybee Memo[]."); *id.* at 257 (Judge Bybee "*should have* questioned the logic and utility of applying language from the medical benefits statutes to the torture statute"). What Judge Bybee *should have* known says little about whether he acted recklessly. In contrast to negligence, recklessness entails action or inaction "in the face of an unjustifiably high risk of harm" or unlawfulness. *Farmer*, 511 U.S. at 836. The probability that harm or a violation of the law will result must be apparent to a "high degree." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Yet OPR did not and could not make such findings.

IV. OPR'S FINDINGS OF MISCONDUCT ARE BASED ON A FLAWED ANALYSIS OF THE BYBEE MEMOS

OPR claims that it did not consider whether or not the Bybee Memos "arrived at a correct result," but then proceeds to rest its findings of misconduct on a supposed pattern of "errors, omissions, misstatements, and illogical conclusions" within those documents. Report at 159-60. For starters, we doubt that any court or bar authority has *ever* held that a lawyer's candor and competence should be assessed by disregarding the accuracy and reasonableness of his conclusions in favor of an exclusive focus on "errors" or "omissions" in the supporting analysis. Under that approach, OLC lawyers could give advice that is later upheld 9-0 in the Supreme Court but still be referred to the Bar because their analysis was too cursory or "one-sided." *Id.* at 258. Indeed, OLC's approach represents the *inverse* of the approach the Supreme Court used to assess the recklessness of the legal interpretation at issue in *Safeco*. Even though Safeco's interpretation was *rejected* by nine justices, the Court still held that the company's position was not reckless because some other judges might have adopted Safeco's view of the law. *Safeco*, 551 U.S. at 69-70. Moreover, the Court held that there was no need to remand for a trial on the details of the company's review of the governing law because the adoption of a reasonable legal interpretation could not be reckless *as a matter of law*. *Id.* at 71.

Yet here, OPR contends that a finding of reckless misconduct is warranted due to the "cumulative effect" of supposed errors and omissions even though OPR assumes that these alleged deficiencies did not actually affect the accuracy or reasonableness of OLC's bottom line advice. Report at 159-60. This unorthodox approach to an assessment of recklessness should be rejected out of hand. *See supra* Section III.C. But even on its own terms, OPR's analysis fails. Nearly all of the supposed "errors, omissions, misstatements, and illogical conclusions" in fact represent unfair characterizations of the advice given in the memos; statements of law that are either correct or open to genuine debate; or questions of judgment on how to write a memorandum. Courts do not categorize such issues as "errors" when assessing a lawyer's ethics or competence. *See supra* Section III.B.1. When the Bybee Memo and the Classified Bybee Memo are read together in their entirety, it readily becomes apparent that most of OPR's objections are unfounded and there is—at the very minimum—fair ground for debate over these issues. Indeed, many of the supposed errors OLC identifies are also found in the Levin Memo—the 2004 OLC opinion that according to OPR "superseded the Bybee Memo and eliminated or corrected much of its analysis." Report at 6. OPR attempts to turn molehills into mountains, and succeeds only in calling its own objectivity into question.

A. Specific Intent

The federal anti-torture statute criminalizes "torture," but restricted that term to acts that are "specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)." 18 U.S.C. § 2340(1). Even though Congress unequivocally established that "specific[] inten[t]" is an integral part of the definition of "torture," OPR implies that OLC never should have seriously analyzed the issue given its "complexity." Report at 160, 169 (quoting the Levin Memo's view that "it would not be appropriate to rely on parsing the specific intent element"). Never mind that a lopsided majority of the *en banc* Third Circuit subsequently adopted the same interpretation of specific intent as the Bybee Memo without any handwringing whatsoever; the court resolved the issue by a vote of 10-3 based on its "ordinary meaning in American criminal law." *Pierre v. Attorney General*, 528 F.3d 180, 187 (3d Cir. 2008) ("*Pierre*"). OPR deems that fact "[ir]relevant" because it supposedly has no bearing on whether the Bybee Memo included a "thorough, objective, and candid analysis of the law in 2002 and 2003." Report at 175 n.132. Goodness gracious. As *Pierre* makes clear, the law did not change. The Bybee Memo just accurately analyzed the most authoritative precedents. The same cannot be said for OPR. The bevy of accusations leveled at this section cannot possibly suggest misconduct in light of *Pierre*'s complete vindication of the analysis.

1. The Bybee Memos set forth a well-reasoned and correct analysis of the specific intent element

OPR does not actually find that the Bybee Memo or the Classified Bybee Memo adopts an erroneous or unreasonable interpretation of the specific intent analysis, choosing instead to build its ethical case on supposed omissions and ambiguities. But any fair ethical analysis would have to start that with an acknowledgement that the analysis accurately predicted the interpretation subsequently adopted by the courts. So we will begin with the Bybee Memo's affirmation by *Pierre* even though OPR deemed the case irrelevant. Report at 175 n.132.

Like *Pierre*, the Bybee Memo began with first principles, citing *United States v. Carter*, 530 U.S. 255, 269 (2000), for the proposition that "[i]n order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act," namely "the specific intent to inflict severe pain." *Compare* Bybee Memo at 3, *with Pierre*, 528 F.3d at 187 ("[I]n order to act with specific intent, an individual must expressly intend to achieve the forbidden act....namely the infliction of the severe pain and suffering.") (citation and internal quotation marks omitted). Like *Pierre*, the Bybee Memo went on to distinguish between specific and general intent, noting that as a "theoretical matter ... knowledge alone that a particular result is *certain to occur* does not constitute specific intent." *Compare* Bybee Memo at 4, *with Pierre*, 528 F.3d at 189 ("Mere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture. Knowledge that pain and suffering will be the *certain outcome* of conduct may be sufficient for a finding of general intent but it is not enough for a finding of specific intent."). And like *Pierre*, the Bybee Memo similarly distinguished between actions taken "because of a given end" and those taken "in spite of their unintended but foreseen consequences." *Compare* Bybee Memo at 4, *with Pierre*, 528 F.3d at 189 (finding that the pain likely to result was an "unintended consequence" and thus "not the type of proscribed purpose contemplated by the CAT"); *see also United States v. Passaro*, Nos. 07-4249, 07-4339, slip op. at 22 (4th Cir. Aug. 10, 2009) (holding that the district court did not abuse its discretion in refusing the defendant's proposed jury instruction because the court "instructed the jury that [defendant] lacked the requisite criminal intent if he 'struck Abdul Wali in order to achieve another objective and not with the express intent to cause bodily harm.'").

Given the Third Circuit's adoption of an analysis that closely tracks the one set forth in the Bybee Memo,[42] there is no reason to assign blame to any of the authors of the memo, let alone Judge Bybee. The analysis appeared persuasive to him at the time, and *Pierre* vindicates that judgment. In addition, the section had been reviewed by Michael Chertoff, the Assistant Attorney General of the Criminal Division at the Department of Justice. Chertoff sat in on multiple briefings regarding the memos, discussed the specific intent section in particular with OLC after Philbin raised concerns with Yoo, and even made comments regarding the specific intent discussion on drafts of the Bybee Memo. Report at 42, 45-46, 57-59. Chertoff concluded that the specific intent section was correct as a legal matter, even though he cautioned that a jury might not be persuaded to acquit if the interrogation actually caused severe pain—a concern that was expressly addressed, as discussed below. *Id.* at 58-59.

2. The 2002 Memos adequately disclosed risks and uncertainties

OPR concludes that this correct analysis of the law was nevertheless "incomplete" because it "failed to note the ambiguity and complexity of this area of law" and did not adequately disclose "possible problems" with a "good faith defense." Report at 160, 175. Any fair reading of the memos reveals that they plainly and emphatically disclosed the only "problems" worth worrying about.

After explaining the law of specific intent, the concluding paragraph of this section explicitly warned the CIA that the acquittal of an interrogator would be "*highly unlikely*" if he held an "unreasonable belief" that the techniques would not cause severe pain. Bybee Memo at 5. OPR tries to paint this as a "cursory qualification[]." Report at 175. But even this stark language was not an isolated phrase buried in a lengthy section. Any fair reader of the section that appears at pages 3-5 of the Bybee Memo would see that these paragraphs are littered with repetitive qualifications cautioning the CIA not to rely on anything other than reasonable beliefs about the severity of the pain its techniques might inflict:

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[42] The striking parallels between the Third Circuit's decision in *Pierre* and the Bybee Memo were not lost on the three judges who concurred in the result. They pointed out that the "issue before us has been the subject of recent commentary," and then proceeded to quote both from the Bybee Memo and (extensively) from the Levin Memo. *Pierre*, 528 F.3d at 193-95 (Rendell, J., concurring).

- "As a *theoretical* matter," knowledge alone "does not constitute specific intent." Bybee Memo at 4.
- "While as a *theoretical* matter, such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that [specific] intent is present." *Id.*
- "[W]hen a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent." *Id.*
- "Where a defendant holds an unreasonable belief ... a jury will be permitted to infer that the defendant held the requisite intent." *Id.*
- "Although a defendant *theoretically* could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation." *Id.* at 5.

The centrality of these cautionary statements was underscored by the Classified Bybee Memo. That memo's analysis of specific intent centered on an assessment of whether the CIA could establish that it reasonably believed that the techniques would not inflict severe pain on Abu Zubaydah in light of his actual physical and mental condition. Classified Bybee Memo at 16-18. The concluding paragraphs stressed the CIA's representations that it had "conducted an extensive inquiry to ascertain what impact, if any, these procedures individually and as a course of conduct would have on Zubaydah" to inform its "reasonable" belief that "the use of the procedures, including the waterboard, and as a course of conduct would not result in prolonged mental harm." *Id.* at 18. And the opening page of the Classified Bybee Memo stressed OLC's "understand[ing]" that the CIA did not have "any facts in [its] possession contrary to the facts outlined here," that the opinion was "limited to these facts," and that "[i]f these facts were to change, this advice would not necessarily apply." *Id.* at 1.

OPR does not even contend that the CIA somehow overlooked these cautionary statements or actually elected to use OLC's "theoretical" analysis of specific intent to proceed on the basis of unreasonable beliefs about the consequences of its proposed techniques. And of course there is no such evidence. *See supra* Section II.E-F. OPR contends, instead, that OLC should have expressed less certainty about its correct interpretation of the law.

First, OLC allegedly "failed to note the ambiguity and complexity of this area of the law" (Report at 160)—as if that sort of statement might have had more impact on the CIA's decisions than an explicit warning that *conviction was "highly []likely"* if the CIA proceeded in the absence of reasonable beliefs about the severity of the pain that would be inflicted. Bybee Memo at 5. OPR nevertheless points to the Levin Memo as its required mode of analysis. Report at 169. That memo, which was written for the public in the aftermath of criticism of the interrogation policies, declined to "define the precise meaning" of specific intent based on the view that "the cases are inconsistent" and that it would be "[in]appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." Levin Memo at 16-17. That advice may have been politic, but it was hardly required as a matter of ethics.

The Levin Memo acknowledged that the Supreme Court opinions cited in the Bybee Memo, *United States v. Carter*, 530 U.S. 255 (2000) and *United States v. Bailey*, 444 U.S. 394 (1980), supported the conclusion that "specific intent" involved a "purpose" or "conscious[] desire[]" to cause a certain result as opposed to mere "knowledge" that it would occur. Levin Memo at 16. It then cited one contrary Fourth Circuit case, *decided before Bailey or Carter*, as its sole example of "inconsistent" cases. *Id.* As the Third Circuit's opinion in *Pierre* later confirmed, 528 F.3d at 187, *Carter* supplied the governing definition of "specific intent" and there was just no need to discuss old lower court authorities. Indeed, *Pierre* emphasized that the interpretation adopted in the Bybee Memo represented the "ordinary meaning" of specific intent "in American criminal law." 528 F.3d at 187. The answer to the question posed was so apparent that the majority only devoted six paragraphs to the issue. *Pierre*, 528 F.3d at 188-90.[43]

Levin's second ground for avoidance was also questionable. It is not only appropriate to "pars[e] the specific intent element," Levin Memo at 17, but doing so is affirmatively required by the structure of the statute. Congress expressly tied the *definition* of conduct that constitutes "torture" to the "specific[] intent[]" of the actor. 18 U.S.C. § 2340(1). Thus, contrary to the Levin Memo's assertion, conduct undertaken without specific intent simply does not "otherwise amount to torture." Levin Memo at 17. Surely OLC cannot be faulted for providing a complete and correct answer to the question asked by the client. *See* Rule 1.4 cmt. [2] ("A client is entitled to *whatever information the client wishes about all aspects of the subject matter* of the representation ....").

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[43] OPR's own recitation of supposed confusion in the law of specific intent, Report at 170-71, does not enhance its position. The passage from *United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978), for instance, refers only to the well-known complexity of the *mens rea* element in criminal offenses as a general matter, without any discussion of specific intent. OPR's citation to *Liparota v. United States*, 471 U.S. 419, 433 n.16 (1985), is also inapposite. In that case, the Court found the requested specific intent instruction "potentially misleading" because the statute at issue never mentioned specific intent but rather forbade "knowing[]" food stamp fraud. *Id.* at 420 n.1. Here, OLC had no option to "eschew use of difficult concepts like 'specific intent,'" *id.* at 433 n.16, because the statute itself includes the concept. The same holds true for OPR's citation to *Bailey*, 444 U.S. at 403-04; while it may be true that statutes increasingly draw from the Model Penal Code in defining the relevant state of mind, the fact remains that Congress has *not* replaced the specific intent standard in the anti-torture statute. Finally, OPR's sampling of Sixth Circuit cases convincingly shows that even if the meaning of specific intent varies by statute, courts have little trouble determining the proper mental state for the statute in question. *See, e.g.*, *United States v. Krimsky*, 230 F.3d 855, 860-61 (6th Cir. 2000) (deciding in four paragraphs that reckless disregard satisfies the specific intent requirement under 18 U.S.C. § 664).

At bottom, it is silly for OPR to claim that the absence of a degree-of-difficulty disclaimer in OLC opinions amounts to an ethical violation. OLC exists to resolve challenging and contentious questions within the executive branch so there is little need to state the obvious. Indeed, OPR acknowledges that the CIA only requested this advice after conducting its own analysis and determining that the issues were of sufficient difficulty that OLC should be consulted. Report at 37. And if there were any doubt about the CIA's understanding of the uncertainties, it is surely resolved by the last sentence of the Classified Bybee Memo, which stated: "We wish to emphasize that this is our best reading of the law; however, you should be aware that there are no cases construing this statute, just as there have been no prosecutions brought under it." Classified Bybee Memo at 18. *See also* Appendix 18 (detailing abundant disclosure of risks and uncertainties in the governing law).

Second, OPR faults OLC for failing to "point out that the good faith defense is generally limited to fraud or tax prosecutions" and asserts that "[t]he availability of good faith as a defense to torture is not a foregone conclusion." Report at 174. That advice would not have been well reasoned at all. Good faith is not an affirmative defense under this statute because good faith is integral to determining whether there has been specific intent in the first place. OLC explained that evidence demonstrating that "a defendant has a good faith belief that his actions will not result" in severe pain would completely "negate the specific intent element" of the statute. Bybee Memo at 8. The qualifications OPR is mandating simply have no applicability to the plain language of this statute. As *Pierre* squarely holds, 528 F.3d at 190, the defendant's own beliefs and "purpose" (and thus "good faith") are an integral part of the restrictive definition of "torture" adopted in the CAT (and thus the statute as well).[44] The D.C. Circuit likewise held in *Price*—one month before the Standards Memo was issued—that "torture can occur under the FSIA [Foreign Sovereign Immunities Act] only when the production of pain is *purposive*." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002).[45] The court expressly found that the infliction of severe pain would not be "torture" if it was "unforeseen." *Id.* at 93. Similarly, DOJ regulations interpreting CAT, which were adopted several years before the events at issue, established that "[a]n act that results in *unanticipated or unintended* severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5). In other words, a defendant who does not foresee, anticipate, or intend to cause severe pain acts in good faith and cannot commit torture as defined in the statute.

Of course OPR does not fault OLC for overlooking these directly relevant authorities. Perhaps that is because they firmly supported the conclusions of the Bybee Memo and foreclosed the need to discuss OPR's preferred (and unsupportable) view of the law? Nor does OPR mention that the Levin Memo (which OPR elsewhere uses as the standard of comparison), as well as the Bradbury Techniques Memo, concluded that "an individual [who] acted in good faith" would not "have the specific intent necessary" to violate the Act. Levin Memo at 17;

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[44] The Justice Department recently cited *Pierre* for this very proposition in a case before the Sixth Circuit. *See* Respondent's Submission in Response to Court's April 16, 2009 Order at 20, *Demjanjuk v. Holder* (6th Cir. Apr. 23, 2009) (No. 09-3416) (quoting *Pierre*, 528 F.3d at 189) ("An applicant for CAT protection must establish that 'his prospective torturer will have the motive or purpose' to torture him.").

[45] As noted by the court in *Price*, "[t]he FSIA's definition of torture derives from the meaning given that term in section 3 of the Torture Victim Protection Act of 1991," which in turn "borrows extensively" from the CAT. 294 F.3d at 91-92.

Bradbury Techniques Memo at 28. Although both memos left open the question whether a good faith belief had to be "reasonable," they certainly did not caution the CIA that good faith might be irrelevant to this statute. Levin Memo at 17; Bradbury Techniques Memo at 28. Indeed, these later opinions suffer from the same alleged shortcomings OPR identifies in the Bybee Memo: they do not "point out that the good faith defense is generally limited to fraud or tax prosecutions"; they do not "address the possibility that a court might refuse to extend the good faith defense to a crime of violence"; and they do not "advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging willful blindness." Report at 174.

Thus, OPR's suggestion that various documents referencing OLC's conclusions about specific intent were somehow misleading is completely misplaced. Every document OPR references—the Bybee Memo, the Classified Bybee Memo, Yoo's July 13, 2002 letter, and the CIA's June 2003 Bullet Points—all included correct statements of the law regarding good faith.[46] There was unanimity at OLC that an individual acting with a good faith belief that his conduct would not inflict severe physical or mental pain or suffering would not have the specific intent to violate the anti-torture statute. *Compare* Bybee Memo at 4, *with* Levin Memo at 17 *and* Bradbury Techniques Memo at 28.

Even though *Pierre*, *Price*, and the CAT regulations amply demonstrate that the OPR-mandated-caveats would have been unsound, the authorities OPR invokes further undermine its analysis. OPR only offers two citations in support of its assertion that "a court might refuse" to recognize that good faith as a "defense to a crime of violence such as torture" because this defense is "generally limited" to fraud or tax prosecutions. Report at 174. *United States v. Wilson*, which considered good faith in a prosecution involving the unlawful export of firearms—not fraud or tax laws—only denied the good faith instruction at issue because "there was insufficient evidence to justify it." 721 F.2d 967, 974-75 (4th Cir. 1983).[47] And OPR's citation (at 174) to Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, *Federal Jury Practice and Instructions* § 19.06 (5th ed. 2000 & 2007 Supp.), fares no better. The model jury instruction referenced in § 19.06 of the treatise describes the good faith defense in general terms, applicable to any appropriate criminal charge.[48]

Third, OPR contends that the Bybee Memo was deficient because it "failed to advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging willful blindness, or conscious or deliberate ignorance or avoidance of knowledge that would negate a claim of good faith." Report at 174. OLC did not use the term "willful blindness," but the Bybee Memos told the CIA everything it needed to know with respect to this risk. As explained above, OLC repeatedly emphasized the importance of due diligence, *e.g.* Bybee Memo at 8, and warned that it was "highly unlikely" that an interrogator would be acquitted in the absence of a reasonable belief. *Id.* at 5. Yoo's July 13, 2002 letter similarly explained that good faith could be established "*if* … it was learned that the conduct would not result in prolonged mental harm" and there was "due diligence" such as "surveying professional literature, consulting with experts, or evidence gained from experience." Report at 161-62. Obviously, an interrogator could not be found to be "willfully blind" if the CIA followed this advice.

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[46] It is worth noting that Judge Bybee had nothing whatsoever to do with either Yoo's July 13, 2002 letter to John Rizzo or the June 2003 CIA bullet points. *See* Bybee Tr. at 116 (Judge Bybee informing OPR that he had never "heard or ever read" about anything regarding a set of bullet points). Thus, OPR's criticism that the CIA Bullet Points "do not mention the one qualification to the good faith defense cited in the Bybee Memo" (Report at 166), has no bearing whatsoever on the assessment of Judge Bybee's responsibility.

[47] Attorney General Mukasey, Deputy Attorney General Filip, and Judge Bybee all have previously made OPR aware of this fact. *See* Mukasey Letter at 6; Bybee Draft Response at 46.

[48] It is likely that OPR is unknowingly referencing a very different principle in the law. When construing statutes that are "highly technical" and not *malum in* se, as in the tax field, courts have been more willing to infer that a criminal offense requires proof that the defendant specifically intended to violate the law. *See Safeco*, 551 U.S. at 57 n.9 (citing *Cheek v. United States*, 498 U.S. 192, 200-01 (1991)). Here, the question concerns the relevance of a good faith belief that the techniques would not cause severe pain—not a good faith belief that the conduct was lawful even if it did.

Regardless, OPR's view has been rejected. Both the Third and Second Circuits have squarely held that willful blindness is *insufficient* to establish specific intent under the anti-torture statute. *See Pierre*, 528 F.3d at 190; *Pierre v. Gonzales*, 502 F.3d 109, 118 (2d Cir. 2007).[49] As the Third Circuit explained, "[w]illful blindness can be used to establish knowledge but it does not satisfy the specific intent requirement in the CAT." *Pierre*, 528 F.3d at 190. Confronted with this authority—which it completely overlooked or ignored in its Draft Report—OPR now claims that these authorities had "no bearing on whether its authors presented a thorough view of the law at that time." Report at 175. But *Pierre* treats its holding as an obvious corollary to the rule that "mere knowledge is [in]sufficient for a showing of specific intent," 528 F.3d at 190, and that interpretation had already been adopted in the CAT regulations and in *Price*. And it is beyond absurd to criticize OLC for correctly predicting the law. OPR's further claim that it only suggested that "a willful blindness instruction might be granted … to counter a defendant's claim that he held a good faith belief" (Report at 175), misses the whole point of *Pierre*. It is the prosecution's burden to prove that the defendant did not hold a good faith belief "that the use of EITs would not result in the infliction of severe mental or physical pain or suffering" (*id.*), and that burden cannot be met with proof of willful blindness.

3. The use of two ambiguous sentences in a lengthy analysis did not render the advice "misleading"

OPR asserts that the analysis of specific intent was "misleading" because it "clearly implied" that interrogators could not be guilty unless they specifically intended to disobey the law and "erroneously suggested" that an interrogator who "acted with the goal or purpose of obtaining information" would not act with specific intent. Report at 171, 160-61. OPR seeks to pluck isolated ambiguities out of context when it knows that the intended audience—the General Counsel of the CIA and the White House Counsel—did not interpret the memos as adopting either view. Nor could they have reasonably relied on any such interpretations without seeking clarification.

First, OPR asserts that OLC's discussion of *Ratzlaf v. United States*, 510 U.S. 135 (1994), "implied that the Court had considered the meaning of specific intent and had concluded that it required an express purpose to disobey the law on the part of the defendant." Report at 171. This is misleading, OPR reasons, because "the *Ratzlaf* decision did not address the meaning of 'specific intent' in a general sense." *Id.* Yet neither the Bybee Memo, nor the Classified Bybee Memo, nor any other OLC opinion ever sought to apply *Ratzlaf* as a rule of "general" applicability. To the contrary, the Bybee Memo explained how the Court in *Ratzlaf* construed "the statute *at issue*," noting—accurately—that under the Bank Secrecy Act the forbidden act was a "purpose to disobey the law." Bybee Memo at 3. Nowhere does OLC seek to extend the "purpose to disobey the law" language of *Ratzlaf* to the anti-torture statute or any other statutory regime. In fact, in the very next sentence the Bybee Memo makes its use of *Ratzlaf* as an "example" of specific intent analysis crystal clear. It draws a contrast to *Ratzlaf* by noting that "[h]ere," under Section 2340, the forbidden act is the "intent to inflict severe pain." *Id.* at 3. As Judge Bybee explained in his interview with OPR (Bybee Tr. at 64), "I think we've been quite clear in that next sentence, [that Section] 2340 requires the defendant act with the specific intent to inflict severe pain, and we have not echoed the holding in *Ratzlaf* described in the previous sentence that you had to act with a specific intent to violate the law."[50]

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[49] The Department of Justice itself argued this point before the Third Circuit in *Pierre*. *See* Supplemental Brief for Respondent at *11, *Pierre v. Gonzales*, 2008 WL 5793263, (3d Cir. Feb. 1, 2008) (No. 06-2496) ("Willful blindness is not tantamount to specific intent because willful blindness at most establishes the actor's knowledge; it does not establish illicit motive or purpose.").

Every reference in the Bybee Memo to the requisite proof of specific intent under the anti-torture statute refers to proof that the defendant intended to cause severe pain. *See, e.g.*, Bybee Memo at 1 ("We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical."); *id.* at 3 ("Thus, to convict a defendant of torture, the prosecution must establish that ... the defendant specifically intended to cause severe physical or mental pain or suffering"); *id.* at 3 ("To violate Section 2340A, the statute requires that severe pain and suffering must be inflicted with specific intent."); *id.* at 8 ("A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture."). It never once asserts that conviction would turn on proof that the defendant intended to violate the law. The same is true of the Classified Bybee Memo. It includes a section on specific intent but never cites *Ratzlaf* or suggests that an interrogator must intend to disobey the law. To the contrary, it reminds the CIA that, "[a]s we have previously opined, to have the required specific intent, an individual must expressly intend to cause ... severe pain or suffering." Classified Bybee Memo at 16 (citing Bybee Memo at 3). The Bybee Memo expressly and correctly highlights *Ratzlaf* as an "example" of how courts apply the general rules governing specific intent explained in *Carter*, not a general rule itself. Bybee Memo at 3. Rather than reference all of these express, unequivocal statements to clarify any ambiguity created by the citation to *Ratzlaf*—as the law unquestionably requires—OPR instead seeks to bolster its interpretation by quoting a *deleted* sentence from a *draft* of the Bybee Memo. Report at 172-73. In other words, OPR considers OLC's efforts to delete sentences that would be ambiguous or inaccurate as evidence of misconduct.

Second, OPR concludes that OLC "erroneously suggested that an interrogator who inflicted severe physical or mental pain or suffering on an individual would not violate the torture statute if he acted with the goal or purpose of obtaining information." Report at 160-61. This conclusion is supposedly supported by the "totality of OLC's legal advice to the CIA on this subject" (*id.* at 161), even though none of the documents OPR identifies makes *a single reference* to the CIA's purpose of obtaining information when discussing specific intent. Instead of genuinely evaluating the totality of the advice and the CIA's actual interpretation of the advice, OPR chooses to base bar referrals on an ambiguity grounded in a single sentence.

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[50] Even one of OPR's investigators, during Judge Bybee's interview, admitted as "a side issue" that he didn't think *Ratzlaf* "was a central part of what the memo was saying." Bybee Tr. at 62-63.

OPR "point[s] to the following sentence" which states that "even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith." *Id.* at 167. Although it is possible to read this sentence to mean that a defendant who inflicts severe pain with the "objective" of securing information lacks the requisite intent, that is not the most reasonable reading of this sentence even when it is read in isolation. An interrogator who seeks to inflict severe pain in order to secure information would in fact have the "objective" of "causing such harm" as a means of achieving his ultimate "objective" of securing information. The sentence OPR relies upon never states or implies that "causing such harm" must be the defendant's sole or ultimate objective. Indeed, the Third Circuit explained this precise hypothetical in *Pierre*. The majority noted the concurring opinion's assertion that "under [the majority's] definition, it would not be torture for a jailer to use electric shock tactics to solicit information where the 'purpose in interrogating' is to obtain information." 528 F.3d at 190 n.7; *see id.* at 196 (Rendell, J., concurring). Unlike Judge Bybee, the majority in *Pierre* had the opportunity to clarify its analysis and explained that "people commonly have dual purposes" and the jailer in the hypothetical "would have a purpose of inflicting serious pain and suffering" because "the reason a jailer uses torture tactics is the jailer's belief that the pain caused will induce the prisoner to reveal information." *Id.* at 190 n.7.

The accused sentence in the Bybee Memo can and should be explained in precisely the same way here. Instead of absolving a CIA interrogator who purposefully inflicts severe pain in order to get information, the sentence is best read to describe the type of "theoretical" fact pattern that was actually presented in *Pierre*. As explained, the Haitian government knew that imprisoning Pierre would likely lead to severe pain and suffering because of the lack of adequate medical care for his health condition, and the Court held that this "unintended consequence" did not demonstrate the requisite "purpose of inflicting severe pain or suffering." *Id.* at 189-90. Thus, *Pierre* conclusively demonstrates that there is a legally *correct* reading of that sentence in the Bybee Memo that is fully consistent with its text.

OPR offers no good reason why it should prefer to adopt an *incorrect* reading of the law that is in no way required by the language that was used. Ambiguities are inherent in the drafting process and it is axiomatic that they should be resolved in favor of reasonable interpretations of the law. In *Auguste v. Ridge*, for example, the BIA opinion under review had one "troubling statement" that could be read to require proof of "an intent to inflict torture." 395 F.3d 123, 146 (3d Cir. 2005). The Third Circuit nevertheless refused to reverse the decision when "the rest of the opinion clearly indicates that the BIA appropriately understood" that the law only required "specific intent to inflict severe pain or suffering, not anything more." *Id.* at 146-47. In fact, the same criticism at issue here could be leveled against the D.C. Circuit. In *Price*, the D.C. Circuit, in an opinion by Judge Edwards, held that the definition of torture under the FSIA and TVPA required proof that the defendant "impose[d] suffering cruelly and deliberately, rather than as the unforeseen or *unavoidable* incident of some legitimate end." 294 F.3d at 93. This sentence surely could be read to mean that an interrogator's use of severe pain is simply the "unavoidable incident" of its "legitimate" quest for information, and that there is accordingly no specific intent. But we can be fairly sure that is not what Judge Edwards meant.

And any doubts about OLC's meaning are resolved through reference to the balance of OLC's advice and the CIA's interpretation. If OLC actually intended to tell the CIA that its motive to obtain information negated specific intent, it surely would have spelled that out. What an easy defense that would be. But OLC never said that anywhere. Not once. Nor would there have been any need to analyze the basis for the CIA's belief that the techniques would not actually cause severe pain or suffering. *See* Classified Bybee Memo at 4-9. It is also telling that OPR interviewed the lawyers in the CIA General Counsel's office (Report at 6-7), but never suggests that any of them ever said that they actually believed that the memo means what OPR says it means. Indeed, the CIA's internal Interrogation Guidelines, which were drafted after receiving OLC's advice, make no reference to this purported exception. They instead state that medical personnel must ensure that the detainee does not experience severe pain or suffering. DCI Guidelines on Interrogations 2 (Jan. 28, 2003) ("In each case, the medical and psychological personnel shall suspend the interrogation if they determine that significant and prolonged physical or mental injury, pain, or suffering is likely to result in the interrogation is not suspended."). Yet OPR somehow fails to mention this evidence of how the CIA interpreted its own authority under the memos.

In the end, OPR considers it fair to adopt this resolution of the ambiguity because some OLC lawyers said it was a *possible* reading of the sentence. Levin told OPR that the memo "*sort of* suggested" this interpretation, which would be "ridiculous." Report at 168. The fact that this reading would be "ridiculous" is a rather good sign that it was not intended. Philbin said he disagreed with the memo "to the extent it *could* be read" to suggest this interpretation—not that he thought that was the best or only interpretation. Report at 168.[51] And another, unnamed attorney told OPR it "*could* be read" OPR's way and that he was "left wondering." *Id.* at 169. In other words, they all identified an ambiguity. None of them concluded that the client could reasonably rely on such a reading or that it did so. And the facts foreclose that view. There is simply no basis to treat this ambiguous sentence as contributing to any "serious deficiency" in the representation.

B. "Severe Pain"

OPR next levels multiple criticisms against the Bybee Memo's inquiry into the meaning of "severe pain." Report at 176-84. As explained below, none have merit and so they provide no basis for OPR's findings as to thoroughness, objectivity, and candor. *Id.* at 226, 228.

With the Bybee Memo, OLC attempted to provide a concrete, understandable interpretation of "severe" pain as that phrase is used in the federal criminal anti-torture statute.[52] As noted, the task is one of line-drawing—distinguishing between the extreme conduct constituting torture and other conduct that might well be cruel, inhuman, and degrading, but does not rise to the level of torture. Collectively, the Bybee Memos finds that several techniques fall on the "torture" side of the line (including burning, needles under the fingernail, electric shocks, piercing the eyeball, hanging from hands or feet, and severe beatings), while several other techniques, subject to specifically-enumerated constraints, do not (including sleep deprivation, stress positions, and waterboarding). These are reasonable lines to draw.

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[51] Philbin added that there would be "*no reasonable basis* to believe that the Bybee Memo would be used to justify any operational activity apart from the specific practices authorized in the Classified Bybee Memo." Report at 63.

[52] *See* 18 U.S.C. § 2340(1) (defining "torture" as an act "specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)"). The statute does not elaborate on "severe physical ... pain," but defines "severe mental pain" as "prolonged mental harm" caused by one of the following predicate acts: the threat of imminent death; the threat or intentional infliction of severe pain or suffering; the threat or administration of mind-altering drugs; or the imminent threat of any of these against a third party. 18 U.S.C. § 2340(2). Severe mental pain is addressed further below. *See infra* Section IV.H.2-3.

The Bybee Memo examines the plain statutory text, several dictionary definitions of "severe," and the statute's legislative history. After an exhaustive review of these sources—the same sources of statutory interpretation relied upon by Supreme Court justices and other executive branch attorneys—it was clear that by using the adjective "severe" to describe the pain threshold necessary for conduct to constitute torture, Congress meant to set a particularly high bar. *See* Bybee Memo at 5 (noting that dictionary definitions of severe include "pain hard to endure; sharp; afflictive; distressing; violent; extreme; as *severe* pain, anguish, torture"; "extremely violent or grievous: severe pain"; "grievous, extreme"; "hard to sustain or endure"). OLC also reviewed the U.S. Code for other instances of the term "severe pain," and discovered that the phrase appears in only one other context in the entire U.S. Code: a collection of Health and Human Services statutes. From those statutes, the Bybee Memo determines that "severe pain" is the type that is "equivalent in intensity to the pain accompanying serious physical injury." *Id.* at 1; Classified Bybee Memo at 10. Even so, the memo stresses that "a *single incident* can constitute torture" and that "the harm sustained from the acts of torture *need not be permanent*." Bybee Memo at 26, 21; *see also* Classified Bybee Memo at 9 (analyzing each of the techniques individually because "a single event of sufficiently intense pain may fall within this prohibition").

This high bar is entirely consistent with the text and ratification history of the CAT, which distinguishes between torture and other cruel, inhuman and degrading acts, reserving for the former category only the most extreme conduct. *Compare* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Article 1 (torture), *with* CAT Article 16 (cruel, inhuman and degrading acts); *see infra* Section IV.C. As the CAT itself provides, while state parties must undertake to criminalize "torture" (Article 4), they need not do so for "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" (Article 16.1).

This distinction also resonates with a host of judicial opinions interpreting the Torture Victim Protection Act ("TVPA") (another statute implementing the CAT, by providing civil remedies for torture), which the Bybee Memo discussed in its text and in a substantial appendix. Bybee Memo at 22-31, 47-50. Moreover, shortly before the Bybee Memo was finalized, the D.C. Circuit explained that "severe pain" entails "'excruciating and agonizing'" pain that is "intense, lasting, or heinous" and described the "severity requirement" as "crucial to ensuring that the conduct proscribed … is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." *Price*, 294 F.3d at 92-93 (reversing 110 F. Supp. 2d 19 (D.D.C. 2000) (cited in Bybee Memo at 47)).[53] The court thus rejected, as insufficient to meet this "rigorous definition of torture," the plaintiffs' allegations of being "kicked, clubbed, and beaten"; being deprived of medical care; and being "interrogated and subjected to physical … abuse." *Id.* at 86, 93. In short, consistent with these authorities, the Bybee Memo thoroughly analyzed the meaning of the term "severe pain" and arrived at an eminently reasonable interpretation.[54] *See also* Report at 187 (noting that the Bybee Memo reached an "*uncontroversial conclusion* that torture is an aggravated form of cruel, inhuman, and degrading treatment.").

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[53] Although not directly applicable here, torture has been described in other contexts in similarly stark terms. *See, e.g., The Margharita*, 140 F. 820, 828 (5th Cir. 1905) ("unspeakable agony"); *Wade v. Calderon*, 29 F.3d 1312, 1338 (9th Cir. 1994) (Trott, J., concurring and dissenting) ("torment or agony"); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 206 (2d Cir. 2009) (Wesley, J., dissenting) ("horrific physical and emotional pain").

1. The Bybee Memo reasonably examines statutes with similar phrasing

OPR criticizes the Bybee Memo for interpreting "severe pain" in part by analogizing to terms used in a collection of health care statutes. Report at 176-84; *id.* at 230 (health care statutes are "of no practical value in interpreting the [anti-torture] statute"). This, however, is a standard analytical practice and certainly not evidence of ethical misconduct, even if reasonable attorneys can debate how much weight to afford an analogy to other statutes in this context. It is not for OPR to preempt OLC's reasonable judgments with its own on such basic matters of legal judgment.

After the memo examines the text of the statute and several dictionary definitions, it looks for other statutes using the same term. Bybee Memo at 5-6. The phrase "severe pain," however, appeared nowhere else in the U.S. Code, except for a collection of health care statutes addressing the provision of emergency medical services. *See* 8 U.S.C. § 1369; 42 U.S.C. §§ 1395w-22, 1395x, 1395dd, 1396b, 1396u-2. These statutes define an "emergency medical condition" as one "manifesting itself by acute symptoms of sufficient severity (including *severe pain*) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in" "serious impairment to bodily functions"; "serious dysfunction of any bodily organ or part"; or "serious jeopardy" to the patient's health. *E.g.*, 42 U.S.C. § 1395w-22(d)(3)(B). Therefore, to "shed more light" on the common meaning of the term, the Bybee Memo considers those statutes, transparently acknowledging that they "address a substantially different subject" (Bybee Memo at 6), and determines that Congress viewed "severe pain" as akin to "the pain accompanying serious physical injury"—such as, but not limited to—"organ failure, impairment of bodily function, or death." Bybee Memo at 1; *see id.* at 5 (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991), for the general proposition that "we construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law").

Initially, OPR sought to advance the rather stunning argument that OLC is precluded, on pain of professional punishment, from giving *any* consideration to these admittedly unrelated statutes that use precisely the same phrase. OPR stated: "*We know of no authority*, and the Bybee Memo cited none, in support of the proposition that identical words or phrases in two unrelated statutes are relevant in interpreting an ambiguous term." Draft Report at 138. That was, of course, patent nonsense, and OPR now concedes (as it must), that "[i]nterpreting ambiguous statutory language by analogy to unrelated but similar legislation is a recognized technique of statutory construction." Report at 182. It is remarkable that OPR needed this basic principle of statutory interpretation explained and, frankly, calls into serious question anything else OPR has to say on the matter (let alone on complex matters of *constitutional* dimension, *see infra* at Section IV.F).

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[54] The D.C. Circuit's opinion lends significant support to the Bybee Memo's interpretation of the anti-torture statute even though the Bybee Memo neglects to cite it. Indeed, the D.C. Circuit *reversed* the district court's opinion, which the Bybee Memo had discussed (at 47).

Of *course* courts can consider similar phrases wherever they might occur—in dictionaries, in court opinions, and in unrelated statutes—to shed light on common understandings of the English language. As the Seventh Circuit explained, "sometimes courts simply interpret ambiguous statutory language by reference to similar terms in an unrelated act." *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001) (Flaum, C.J.).[55] And Sutherland's treatise makes perfectly clear that it is wholly appropriate to interpret one statute "by analogy" to "unrelated statutes." 2B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 53:3 (7th ed. 2008) ("Sutherland") (citing over 100 state and federal cases); *id.* § 53:4 (citing over twenty additional examples). Sutherland points out that "the interpretation of a *doubtful* statute may be influenced by language of *other statutes which are not specifically related*, but which apply to similar persons, things, or relationships." *Id.* § 53:3. Sutherland further explains: "Those forces which operate to produce a sufficient incidence of congruence even among statutes on different and dissimilar subject are conventional modes of thinking about legislative problems and solutions, common idioms and customary language usage, and established approaches to the design of the statutory provisions." *Id.* § 53:1. Thus, construing statutes "by reference to other"—even unrelated—statutes advances the values of "[h]armony and consistency." *Id.* In fact, "courts have been said to be under a *duty* to construe statutes harmoniously where that can reasonably be done." *Id.*[56]

OPR nonetheless argues that the use of the statutes here was "illogical" because "the intensity of pain that accompanies organ failure or death has *no commonly understood meaning* and had no practical value in explaining the meaning of 'severe pain.'" Report at 176, 178; *see also id.* at 230. In particular, OPR reasons, there is no logical connection because serious physical injuries such as organ failure and death can occur with no pain whatsoever. *Id.* at 176 n.133, 179.

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[55] *See also, e.g.*, *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835-36 (2008) (interpreting term by looking to use of same term in wholly unrelated statute); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) (same); *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100-01 (1941) (same); *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 527 (5th Cir. 2005) (same).

[56] OPR also wisely abandons its prior contention (a red herring) that the Bybee Memo is somehow making an *in pari materia* argument simply because it quotes *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991) (which in turn quotes a chapter of the 1947 edition of Sutherland's that discussed the *in pari materia* doctrine). The Bybee Memo plainly does not consider the health care statutes to be "relating to the same matter," *Black's Law Dictionary* 794 (7th ed. 1999) (defining "*in pari materia*"), *see* Bybee Memo at 6 (the health care statutes use "severe pain" in a "*substantially different*" context), a fact Judge Bybee confirmed in his interview, Tr. 73 ("[W]e haven't made an [*in pari material*] argument here, we aren't arguing that Congress … incorporated that deliberately here."). Further, the drafting history makes clear that [redacted]dded the passing citation to *Casey* simply to support the proposition that other instances of "severe pain" in the U.S. Code can "shed more light on its meaning." Report at 44. Yet, perhaps unable to let it go, OPR argues (at 181) that *Casey* is the "only legal authority" cited by the Bybee Memo (as if any were needed) to justify its analogy to unrelated statutes. But, like the Bybee Memo, *Casey* overtly turns to unrelated statutes in its interpretive process; indeed, one academic has cited *Casey* as a primary example demonstrating courts gathering interpretive insights from unrelated statutes that "concern[] different subjects." William Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. Penn. L. Rev. 171, 171 (2000).

This (refined) argument still misses the point. OLC nowhere claims that, for example, organ failure *always* comes with severe pain. Instead, OLC simply attempts to flesh out a term of uncertain meaning by reference to events that evoke a common understanding of severe pain. As Judge Bybee stated in his interview, because severe pain is a "very difficult thing to define," they "simply tried to provide something else by which [they] can measure this." Bybee Tr. at 80-81; *see also id.* at 70-73 ("we're struggling" to provide a useful interpretation of the term and "we ought to look to any tools we can to try and understand *by analogy* what the term 'severe pain' means"); *id.* at 74 ("[W]e [needed] some standard against which we could measure our decision ... to try to be consistent.").

Indeed, OPR's lead attorney did the same thing, conceding that he would personally consider "painful dentistry" to be an example of severe pain. *Id.* at 80. But, of course, dentistry need not be accompanied by pain any more than organ failure or death. In fact, in modern times, it is probably far *less* likely to involve such pain. It is nonetheless an apt example—and one that the Bybee Memo itself recognized as involving severe pain. *See* Bybee Memo at 26 ("teeth pulling" involves severe pain). Likewise, although it is possible to conceive of a painless "serious physical injury," a gentle "organ failure," or a peaceful "death," that is clearly not going to be the "common understanding" that first comes to mind in the context of defining "torture" and "severe pain." The point is simply that, having no infallible mechanism for measuring pain, the OLC reasonably attempted to provide the client with useful legal advice in drawing lines and breathing life into an otherwise undefined term ("severe" pain), based on the common human experience and understanding reflected in other Congressional enactments.[57]

It is of no moment that, as OPR notes, the health benefits statutes do not "define or even describe 'severe pain'" (Report at 178), as the Bybee Memo never said they provided a concrete definition, only that they can "shed more light" on what a layperson would recognize as severe pain. That is, the Bybee Memo treated the phrase "severe pain" in other contexts as *illustrative*, not dispositive. In fact, OPR concedes that, under the health care statutes, "severe pain" is the type of pain that a "layperson" would understand might well be accompanied by "serious health consequences." *Id.* at 178 ("[The health benefits statutes] simply cite severe pain as [a] symptom[] that would lead a prudent layperson to believe that serious health consequences are likely to result ...."). And OPR acknowledges that Philbin stated that "the health benefit statutes could shed light on a 'lay person's understanding of what kind of pain would be associated with' death, organ failure, or loss of bodily function." *Id.* at 130 n.103 (quoting Philbin). Fairly read, this is all the Bybee Memo says. If (as the health care statutes assume and OPR acknowledges) it is reasonable for a layperson who feels "severe pain" to conclude that she is having "a serious dysfunction of any bodily organ or part," then it is perfectly logical to conclude (as does OLC) that there is a common understanding that "organ failure" is thought to be associated with a certain level of pain. If the association between severe pain and serious health consequences is as attenuated as OPR asserts (whether in perception or in reality), then the health benefits statutes themselves are "illogical."

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[57] It is not as if OLC plucked the term "severe" from statutes addressing, say, "severe weather" or "severe budget deficits"—contexts wholly unrelated to human health and physiology. *Cf.* 7 U.S.C. § 415-1(b)(2) ("severe ... poverty"); 42 U.S.C. § 17714 ("severe storms").

This is a particularly relevant exercise here because "severe pain" appeared nowhere else in the U.S. Code at the time; it is not a "common law term" or a "legal term of art" (Bybee Tr. at 70-73), and the legislative history is "scant" (Bybee Memo at 12). So, even if unrelated statutes are a "relatively weak aid," *Firstar*, 253 F.3d at 991, it surely cannot constitute professional misconduct to explore all available insight when attempting to discern the meaning of a statutory phrase. *See* Sutherland §§ 53:3-53:4. Similarly, although Philbin thought the medical statutes were "imprudent to use in this context," he said that the statutes could "shed light" on a lay person's understanding of severe pain. Report at 57, 130 n.103. Here, the Bybee Memo (which Philbin himself cleared Judge Bybee to sign) stressed in no uncertain terms that the health care statutes "address a substantially different subject," lest any unwary readers make too much of the analogy. Bybee Memo at 6.

Furthermore, it is especially important in the context of a criminal statute to provide "some fairly concrete context" [redacted] given that courts have long recognized that criminal sanctions can only be imposed if defendants have sufficient notice of the conduct that is prohibited, *see, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 148-49 (2007) ("'As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978) ("'[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant ....'" (citation omitted)). As Judge Bybee noted, there was "some concern that the statute might be void for vagueness," and, as they "had real questions" before them, they could not address the task "simply as a philosophical nicety." Bybee Tr. at 73.

OPR's argument that OLC must first recite that the term is "ambiguous" before looking to unrelated statutes is unavailing. Report at 181 n.135 (OLC "should have demonstrated that the term 'severe pain' was ambiguous before turning to other statutory sources" (citing *Casey*)). *Casey itself* did not feel constrained to find language ambiguous before assessing unrelated statutes. Instead, *Casey* found the term at issue "unambiguous" and simply looked to other statutes in the course of determining the "ordinary meaning of the statutory terms" and the "normal import of the text." 499 U.S. at 98. In any event, whatever kernel of ambiguity OPR deems necessary is readily present here. In *Price*, for example, the D.C. Circuit explained that "the meaning of 'severe'" is "ambigu[ous]." 294 F.3d at 92. The Levin Memo similarly recognized (at 8) that "[d]rawing distinctions among gradations of pain ... is obviously not an easy task"; the Bradbury Techniques Memo noted (at 2) that "severe" is an "imprecise" term imbued with a "degree of uncertainty;" and Goldsmith stated that "[i]t is very hard to say in the abstract what the phrase 'severe pain' means." Goldsmith, *The Terror Presidency* at 145; Report at 179. And the simple fact that the Bybee Memo looked beyond the face of the statute should make plain that it, too, obviously recognized that there is some "degree of uncertainty" in the phrase at issue.

Finally, OPR also argues that OLC has, in summarizing the health benefits statutes, "rephrased the language of the statutes" so as to "add further support to their 'aggressive' interpretation of the torture statute." Report at 178. This argument lacks merit. To start with, this line of attack is in considerable tension with OPR's argument that any association between physical injuries and pain is *per se* illogical. OLC can hardly inflate the severity of the pain by altering the description of the physical injuries if there is no natural connection between the two. In any event, the Bybee Memo does not improperly "heighten the severity of the listed consequences." *Id.* The Bybee Memo forthrightly quoted the health care statutory language and then simply summarized it as directed to a "serious physical condition or injury" (Bybee Memo at 6), which is a fair approximation of such injuries as "serious impairment to bodily functions," "serious dysfunction of any bodily organ or part," and "serious jeopardy" to a patient's health. The Bybee Memo then simply provides representative, concrete examples (organ failure, death, serious or permanent impairment of bodily functions) not, as OPR seems to think, as an exclusive list. *See* Report at 177-78.[58]

Tellingly, OPR offers no solutions on what OLC should have done to interpret severe pain and what sources and analogies OLC should have used. Apparently OPR would have OLC simply throw up its hands. But this ignores that it is precisely OLC's job to attempt to give concrete answers to real-world questions. Undoubtedly, had OLC neglected to cite the health care statutes, OPR would have pounced on that as well. *Cf. infra* Sections IV.E, IV.F, IV.G. Nor did OPR consult other OLC opinions, where it would have found numerous examples of OLC making far more attenuated analogies. For example, in 1977, in the nascent Carter Administration, Assistant Attorney General Harmon, in determining whether a state can rescind its approval of a constitutional amendment, interpreted the constitutional language in Article V ("when ratified by the legislatures of three fourths of the several states") based in part on "precedents in the fields of municipal bond elections or votes on special assessments." *Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, 1 Op. O.L.C. 13, 14-15 (Feb. 15, 1977). Surely this is even further removed than consulting some emergency health care statutes to "shed more light on" the meaning of "severe pain." Bybee Memo at 5. The practice of interpreting statutes by comparison to unrelated statutes continues in the present OLC.[59] OPR's failure to assess whether OLC's performance was commensurate with other OLC opinions, per D.C. Rule 1.1(b), belies the notion that OLC's duty is "unambiguously" known.

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[58] OPR states that "'serious jeopardy' became 'death,' 'serious dysfunction of any bodily organ' became 'organ failure,' and 'serious impairment of bodily functions' became 'permanent damage.'" Report at 178. These terms are all of a piece—reasonably "paraphrased" (*id.* at 178 (quoting Yoo))—and not as dissimilar as OPR believes. It is hard to see, for example, how "dysfunction of [a] bodily organ," 42 U.S.C. § 1395w-22(d)(3)(B)(iii), is that different from "organ failure." *See, e.g., Merriam-Webster's Collegiate Dictionary* 360 (10th ed. 2001) ("dysfunction" defined as "impaired or abnormal functioning"); *id.* 416 (definitions for "failure" include "state of inability to perform a normal functioning"). In any event, OPR acknowledges that OLC "restated [its] conclusion several times, with slight variations," some of which use other terms, such as "serious physical injury" and "impairment of bodily function." Report at 177. OPR gives no justification for cherry-picking certain words, divorcing them from the rest of the opinion (let alone from the ultimate approval of the 10 specific techniques). *Cf. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions ...."); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ....'" (citation omitted)).

[59] *See, e.g.*, Memorandum Opinion for the General Counsel, Small Business Administration, from Jeannie S. Rhee, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development,*

In short, OPR is now reduced to quibbling over whether or not OLC made a fitting analogy and properly summarized an unrelated statutory scheme. But reasoning by analogy and distilling statutes is what lawyers *do*, and it is quintessentially a matter of legal judgment whether and how to compare texts, cases, and situations, to other texts, cases, and situations. Although reasonable attorneys may well disagree with OLC's analogy to the emergency health care statutes, that is the stuff of reply briefs and dueling law review articles, not ethics opinions. And OLC did not hide what it was doing or misquote the statute. The power OPR would arrogate to itself as the final arbiter of the exercise of reasonable legal judgment is simply breathtaking.

2. The Bybee Memo never states that torture requires organ failure, death, or serious physical injury

OPR also claims the Bybee Memo "suggest[s] that the torture statute applied only to physical pain that results in organ failure, death, or permanent injury." Report at 228. This is simply false.[60] Alternatively, OPR asserts that "[t]he Bybee Memo's definition of severe pain *could* be interpreted as advising interrogators that they may legally inflict pain up to the point of organ failure, death, or serious physical injury." Report at 180. This is equally untenable, as it is "a gross misreading of the memorandum." Bybee Tr. at 70. Contrary to OPR's suggestion, even if Judge Bybee intended and expected the memo to be used as a field manual (he did not), no rational interrogator, concerned for his or her own liability, would read the memo that way. And Rizzo has confirmed that he "did not interpret the 2002 Bybee Memos to mean that the proposed techniques would not constitute torture unless they caused organ failure." Rizzo Letter ¶ 5.

The Bybee Memo does not require any form of serious physical injury, let alone organ failure or death, as a *prerequisite* to finding severe pain. Instead, it merely concludes that "severe pain" entails a "high level—the level that would *ordinarily be associated with* a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture." Bybee Memo at 6. The memo does *not* state that organ failure, death, or serious injury must occur for the conduct to constitute torture. In his interview, Judge Bybee made clear that such an interpretation would be "a bad reading of the memo" and "illogical." Bybee Tr. at 78-79. He explained that the memo was simply "trying to describe the threshold of pain" and that "severe pain is the kind of pain that rises to such an extreme level that it might be associated with actions such as organ failure." *Id.* at 70. The OPR attorney then in charge of the investigation (who was subsequently reassigned) even conceded: "I'm certain that you [Judge Bybee] didn't intend that result in the memorandum … [and] I don't necessarily take that as a result." *Id.* at 78. Indeed, the memo itself identifies as torture a host of specific activities far short of organ failure or death, including a needle under a fingernail; an electric shock; cigarette burns; hanging by hands and feet; and sustained

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and Service-Disabled Veteran-Owned Small Business Concern Programs 9 (Aug. 21, 2009); Memorandum Opinion for the Counsel to the President, from Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Eligibility of a Retired Military Office for Appointment as Administrator of the National Aeronautics and Space Administration* 2-3 (July 8, 2009).

[60] This canard has long resonated with critics, *see, e.g.*, David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. Times, Apr. 3, 2008, at A19; Dahlia Lithwick, *No Smoking Gun*, N.Y. Times, Aug. 26, 2004, at A27, at least one of whom has since corrected her views, *see* Kathleen Parker, *Steele, But No Magnet*, Wash. Post, May 20, 2009, at A23.

systematic beatings. Bybee Memo at 16, 19-20 & nn.10, 24-25. Consistent with that, the memo states that "'although conduct resulting in permanent impairment of physical or mental faculties is *indicative* of torture, it is *not an essential element* of the offense.'" *Id.* at 21 (citation omitted). Fairly read, the Bybee Memo is plain on its face. Moreover, there is no better evidence that organ failure itself is not the relevant test than the Classified Bybee Memo, which *nowhere* mentions "organ failure" as a necessary criteria (or even as a necessary pain analogue) in analyzing particular techniques.

Furthermore, OLC *specifically rejected* the interpretation that OPR now seeks to read into the memo. An earlier draft of the memo provided that the pain must be of such intensity that it is "*likely to be accompanied by*" serious physical injury, such organ failure and the other stated examples. However, this language was deliberately changed (in a redline) to state that the pain merely must be of an intensity "*equivalent to*" the pain accompanying such serious physical injuries,[61] and it is this latter formulation ("equivalent" to or "akin" to) that survives in the final version. *See* Bybee Memo at 1 ("equivalent in intensity to the pain accompanying serious physical injury"); *id.* at 6 ("the level that would ordinarily be associated with a sufficiently serious physical condition"); *id.* at 13 ("of the kind that is equivalent to the pain that would be associated with serious physical injury"); *id.* at 46 ("of an intensity akin to that which accompanies serious physical injury "). OPR's assertion (at 180) that there is really no difference between the draft and final versions of the Bybee Memo is absurd—especially when it goes directly to the point on which OPR is "gross[ly] misreading" the final version of the memo. There is an obvious difference between saying that someone "likely" has a serious physical injury and saying that someone has pain "equivalent" to that which people ordinarily associate with serious injuries.

Had the CIA read the Bybee Memo in the way OPR has, the CIA would have been wrong. But the undisputed facts show that the CIA did no such thing. OPR does not cite a single CIA document taking the position that pain cannot be "severe" unless it causes serious physical injury. John Rizzo has unequivocally stated that was not his interpretation (Rizzo Letter ¶ 5) and the CIA's interrogation guidelines ("Guidelines")—which OPR never bothers to cite—confirm that view. [redacted] DCI Guidelines on Interrogations 1-2 (Jan. 28, 2003). [redacted] That of course is a correct interpretation of the law. [redacted]

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[61] Attachment to Email from [redacted] to Yoo, July 24, 2002.

[62] OPR refused to provide access [redacted] so we are unable to analyze the text in its entirety. But it is apparent from the portions OPR cites that the guidance did not misinterpret the memos.

[redacted]

In any event, if the CIA was confused on that score or considering techniques other than those specified, OLC made clear that the CIA would need to seek further legal advice. *See* Classified Bybee Memo at 1 ("If these facts were to change, this advice would not necessarily apply.").[63] Furthermore, the memos were not written for interrogators to use as a field manual. They were addressed to the White House Counsel and the CIA General Counsel, were shared with very few individuals, and were not even released publicly until 2004 and 2009 respectively—years after they were written. OPR has not found that Judge Bybee intended or expected the advice to be distributed beyond this tightly-held group. As Judge Bybee explained: "I don't have any knowledge that anybody planned on distributing this document widely. It was so closely held with us that that would have struck me at the time as ... sort of a non starter." Bybee Tr. at 74-75; *cf.* Report at 180[redacted] Similarly, Philbin stated that, "[g]iven the narrow advice in the Classified Bybee Memo and the fact that the CIA's program was highly compartmented, [he (Philbin)] reasonably believed that the superfluous analysis in the Bybee Memo *could not authorize any operational activity.*" [redacted] *see also id.* at 23 ("[T]here was *no reasonable basis* for thinking that the Bybee Memo would be independently used for anything outside the corners of the Classified Bybee Memo ...."). Ultimately, Judge Bybee can hardly be found reckless for any unexpected distribution (and restatement) of his advice or for a hypothetical interrogator who "erroneous[ly]" interprets the memo, in the face of its plain language and specific examples.

3. The Bybee Memo's "severe pain" interpretation is similar to that in later memos

OPR places great weight on the fact that subsequent OLC officials Goldsmith, Levin, and Bradbury disagreed with how the Bybee Memos analyzed the term "severe pain." Report at 178-79. OPR states, for example, that "Goldsmith and Levin explicitly rejected" the Bybee Memo's "formulation [of severe pain] and characterized the reasoning behind it as illogical or irrelevant," *Id.* at 176.[64]

To start with, whatever their disagreements, it bears repeating that *none* of the OLC critics of the severe pain analysis believes it constitutes an ethical violation. *See supra* Section II. Levin, for example, has specifically clarified that he never intended his criticism—in the

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[redacted]hen OLC was much later asked to do the separate Classified Bybee Memo, which explicitly narrowed the scope of the advice—a move Yoo endorsed as a good idea.

[64] OPR also states that the Bybee Memo's formulation of "severe pain" has been "widely criticized ... outside the Department." Report at 176. "Various commentators," OPR observes, have described the definition as "absurd" (Luban), "strained logic" (Harris), and "bizarre" (Clark). Report at 176 n.133 (quoting David Luban, *Liberalism, Torture, and the Ticking Bomb*, in The Torture Debate in America 58 (Karen J. Greenberg ed., 2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. Nat'l Security L. & Pol'y 455, 459 (2005); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. Nat'l Security L. & Pol'y 409, 434 (2005). As discussed below, these are hardly neutral observers. *See infra* Section VI.E.

Levin Memo or otherwise—to suggest that Judge Bybee committed professional misconduct. *See* Levin Decl. ¶ 6. The statutory analysis involved "very difficult questions" on which "[r]easonable attorneys can disagree." *Id.* ¶ 5. Further, Levin stated, "the authors [of the Bybee Memo] might be right and I might be wrong." *Id.*; *see also* Report at 130 & n.103 (noting debate between Levin and Philbin). Similarly, Goldsmith has explicitly stated that Judge Bybee "satisfied his professional responsibilities" and "acted in good faith." Goldsmith Submission at 4 n.7.

Furthermore, in practical application, there was absolutely no difference between the Bybee Memo and the definition subsequently applied by OLC. All of the techniques approved in the Classified Bybee Memo were later re-approved even after the Bybee Memo was withdrawn.[65] In particular, Levin and Bradbury subsequently re-authorized them, along with four new techniques (dietary manipulation, nudity, water dousing, and abdominal slap), in the fall of 2004 and again in the summer of 2005—and not just individually, but also in combination. *See* Levin Letters; Bradbury Techniques Memo; Bradbury Combined Techniques Memo. Rizzo has expressly confirmed the obvious: the Levin Memo "did not fundamentally alter" his "understanding of the ... application of the statute to the enhanced interrogation techniques" and "did not change the answer" to the question of legality. Rizzo Letter ¶ 4.

Also, on a more abstract level, the Bybee Memo's definition of "severe pain" is not so different from the subsequent definition in the Levin Memo. Both distinguish between torture and other acts of "cruel, inhuman or degrading treatment" that do not amount to torture. *Compare* Bybee Memo at 15-16, 27, *with* Levin Memo at 6 & n.14. Indeed, Levin stresses that "distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment ... is consistent with other international law sources." Levin Memo at 6 n.14. Both describe torture and severe pain using words like "extreme," "extremely violent," "intense," "grievous," and "hard to sustain or endure." *E.g.*, Bybee Memo at 5, 16; Levin Memo at 5; *accord* Bradbury Techniques Memo at 19; *see also* Bybee Memo at 21 (torture is the "'gravest form.'" (citation and emphasis omitted)); Levin Memo at 6 (same). Both mention specific examples of torture, including shocks, hanging by hands and feet, burns, beatings, and so on. *E.g.*, Bybee Memo at 16, 19-20 & n.10, 24-25; Levin Memo at 6, 10; *accord* Bradbury Techniques Memo at 20; *see also id.* at 19 (also mentioning the boot, thumbscrews, and the rack).

Although the Levin Memo states that it is explicitly rejecting "excruciating and agonizing" as a standard because OLC "do[es] not believe Congress intended to reach only conduct involving [this level of] pain or suffering" (Levin Memo at 8), it then goes on to embrace a standard defined by "agony" on the very next page. Instead of articulating a formulation for the CIA to apply, Levin directs the reader to rely on the D.C. Circuit decision in *Price*. He reasons that "[w]e are ... aided in [the] task" of "[d]rawing distinctions among gradations of pain" by relying on the "judicial interpretations of the [TPVA]." *Id.* at 8-9. He then gives *Price* the lead in his discussion and includes extensive quotes from the opinion, which reveal that the D.C. Circuit uses "agony" as its benchmark for defining "severe," and explains that "[t]he more intense, lasting, or heinous the *agony*, the more likely it is to be torture,'" *id.* at 9 (quoting *Price*, 294 F.3d at 93). Moreover, in *Price*, the D.C. Circuit cites approvingly the very language that the Levin Memo purports to disavow. *Price*, 294 F.3d at 93 ("'The United States

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[redacted]

understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict *excruciating and agonizing* physical or mental pain or suffering.'" (citation omitted)). Levin also pointed (Levin Memo at 9-10) to *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir 2003), indicating that conduct must be "sufficiently extreme and outrageous" to constitute torture. This is not to say that the Levin Memo fell below the standard of care. It just shows that is easy to come along years later and identify "flaws" in legal reasoning and that his analysis of "severe pain" is *not* demonstrably superior to the analysis in the Bybee Memo. Indeed, it arguably sets a *higher* benchmark for severity by using *Price* and *Simpson* to define the "distinctions among gradations of pain." Levin Memo at 8-9.

For purposes of defining "severe pain" (and, in turn, torture), the difference between "excruciating and agonizing" and "extreme" is elusive at best. *See, e.g.*, *Webster's New World Dictionary* 27, 489, 1502 (2d ed. 1984) (defining "excruciate" and "agonize" as to "torture"; defining "excruciating" as "extreme"). Interpreting "severe" to mean "excruciating and agonizing" is perfectly rational. *See, e.g.*, *Oxford American Writer's Thesaurus* 310 (2004) (synonyms of "excruciating" include "agonizing" and "severe"). Courts and individual jurists have often used "severe" pain and "excruciating" pain apparently interchangeably.[66] In fact, in an article cited both in the OPR Report (at 181 n.135) and by the Levin Memo (at 8 n.18), "severe" pain is equated to pain that is "excruciating" and "as bad as it can be." Dennis C. Turk, *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, at fig.1 & accompanying text (Sept. 1993). Furthermore, the Levin Memo acknowledges that there is "some support" for interpreting severe pain as "excruciating and agonizing," Levin Memo at 8 (citing Deputy Assistant Attorney General mark Richard's testimony in 1990), but nonetheless baldly asserts, without citation, that it "believe[s] that in common usage 'excruciating and agonizing' pain is understood to be more intense than 'severe' pain," *Id.* at 8 n.17.

In any event, the Bybee Memo never uses "excruciating and agonizing" pain as an *exclusive* definition of severe pain. Quite the contrary, the memo makes clear that it cites that language merely to demonstrate that the CAT's ratification history supports the memo's broader conclusions that there is a distinction between torture and cruel, inhuman or degrading conduct and that "only the most extreme acts" qualify as torture. Bybee Memo at 15, 19; *see id.* at 21 (the "CAT's negotiating history offers more than just support for the view that pain or suffering must be extreme to amount to torture"); *id.* at 22 (torture is the "most egregious conduct" at the "extreme end of the spectrum of acts"); *id.* (ratification history, negotiation history, and "[e]xecutive interpretations confirm our view that the treaty (and hence the statute) prohibits only the worst forms of cruel, inhuman, or degrading treatment or punishment"); *see also infra* Section IV.C. In fact, the Bybee Memo explicitly reserves the "purely academic question" of whether "excruciating and agonizing" represents the definitive formulation for "severe pain." Bybee Memo at 19; *infra* Section IV.C.

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[66] *See, e.g., Collinsworth v. AIG Life Ins. Co.*, 267 Fed. Appx. 346, 347 (5th Cir. 2008); *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 270 (3d Cir. 2001); *Soger v. R.R. Retirement Bd.*, 974 F.2d 90, 93 (8th Cir. 1992); *Zeno v. Great Atl. & Pac. Tea Co.*, 803 F.2d 178, 183 (5th Cir. 1986) (Jones, J., concurring and dissenting); *Gallant v. Heckler*, 753 F.2d 1450, 1458 (9th Cir. 1984) (Jameson, J., dissenting); *Jorgensen v. Meade Johnson Labs., Inc.*, 483 F.2d 237, 239 (10th Cir. 1973) (quoting complaint); *see also Roach v. Prudential Ins. Brokerage, Inc.*, 62 Fed. Appx. 294, 297 (10th Cir. 2003) (noting doctor, who equated "severe" and "excruciating" with "grade 10 [out of 10] pain"). *But see Walker v. Barnhart*, 127 Fed. Appx. 207, 210 (7th Cir. 2005) ("10 was to be considered excruciating pain, 7 to 9 severe pain, 4 to 6 moderate pain, and 1 to 3 mild pain").

Furthermore, in many respects, the Bybee Memos provide much *more* useful advice than the Levin Memo. Whereas the Levin Memo makes little attempt to explain the practical application of the statute, the Bybee Memo, whether or not all would agree with it, at least attempts to set forth a recognizable standard against which to judge "severe" pain. Also, the Bybee Memo assessed far more cases addressing severe pain than did the Levin Memo. *See* Bybee Memo at 47-50 (appendix).

4. Congress later endorsed the Bybee Memo's definition of "severe pain"

It is ultimately Congress's responsibility to clarify ambiguous statutes if it disagrees with the other branches' interpretations. In initially passing the anti-torture statute, Congress offered no definition of "severe pain"—forcing courts and executive branch officials to interpolate. Later, however, Congress essentially ratified the Bybee Memo's definition of torture. OPR has no answer for this argument, which we also raised in our Draft Response (at 42-43).

The Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, defines "serious physical pain or suffering" for determining the offense of "cruel or inhuman treatment"—which is a lower standard than the "severe pain" of torture—as "bodily injury that involves—(i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 2441(d)(2)(D) (war crimes); *accord*, 10 U.S.C. § 950v(b)(12) (offenses triable by military commission).[67] This is remarkably similar to the language the Bybee Memo used in interpreting the statute and, if anything, is *more* rigorous given that it requires "bodily injury." In effect, Congress has now weighed in and confirmed the memos' general interpretation of the statute. At the very least, contrary to OPR's conclusion (Report at 176 n.133; *id.* at 179), Congress has itself concluded that there is a logical association between pain and certain physical conditions. Accordingly, the Bybee Memo's interpretation can hardly be considered so "illogical" as to warrant ethical sanctions.

C. CAT Ratification History

OPR also concludes that the Bybee Memo misused the ratification history of the CAT to support the view that "'severe pain' under the CAT is 'in substance not different from' pain that is 'excruciating and agonizing.'" Report at 184. Yet this interpretation of the ratification history is unquestionably a fair ground for debate because a contemporaneous opinion of the D.C. Circuit read the ratification history in the precise way that OPR condemns. In addition, OPR ignores the fact that the authors of the Bybee Memos (unlike the D.C. Circuit) chose not to rely on the terms "excruciating" or "agonizing" when articulating or applying the standard for identifying "severe" pain. They explicitly acknowledged the uncertainty surrounding the ratification history and eschewed reliance on the view that the standards were the same.

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[67] This Act passed the Senate by a vote of 65-34, with the bi-partisan majority comprised of 53 Republicans and 12 Democrats, and the House by a vote of 250-170, with the majority comprised of 218 Republicans and 32 Democrats.

First, OPR mistakenly contends that reliance on the Reagan administration's proposed understandings of the treaty was "misplaced" because the Senate never ratified the Reagan understandings.[68] Report at 186. But the Reagan administration *negotiated* the CAT, which makes its understanding a highly relevant part of the treaty's ratification history. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 28 (Apr. 9, 1987) (noting that among sources of extrinsic evidence, "[t]he portions of the ratification record entitled to the greatest weight are representations of the Executive, who is in essence the draftsman of the treaty").[69] When presented with this precise issue, the D.C. Circuit unequivocally held that the "drafting histor[y]" of the CAT "address[ed]" the "ambiguities lurking in [the] definition ... of 'severe' ... pain" and that the relevant sources included the intent of "the Reagan Administration that signed it" as well as "the Bush Administration that submitted it to Congress." *Price*, 294 F.3d at 92. Indeed, as Judge Bybee previously advised OPR, Draft Response at 47, the D.C. Circuit unequivocally relied on the Reagan Administration's understanding of the treaty in defining "severe" pain. In a unanimous opinion by Judge Edwards, the Court concluded that "torture" is characterized by "*agony*" that is sufficiently "intense, lasting, or heinous," citing the precise Reagan understanding that OPR contends (Report at 186) had "no effect" on the proper interpretation of the CAT. *See Price*, 294 F.3d at 93 ("'The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.'") (quoting S. Exec. Rep. No. 101-30, at 15 (1990) ("Senate Report")). Perhaps OPR should be excused for overlooking this key precedent in its draft report because of understandable lapses in thoroughness, but OPR's failure to cite *Price* in its final draft is not so easily dismissed. It is inexcusable for OPR to have ignored *Price*. OPR must acknowledge, at a minimum, that reliance on this portion of the ratification history to help define "severe pain" cannot be the type of "error" that suggests unethical conduct.

Second, the history that OPR recites by no means proves that the Bush Administration actually disavowed "agonizing" and "excruciating" as useful standards for defining "severe" physical pain or that the Bybee Memo "inaccurate[ly]" disclosed the relevant history. Report at

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[68] OPR also fails to acknowledge that the Bybee Memo explicitly states that it accorded the highest "interpretive value" to the testimony of the Bush Administration officials who testified before Congress concerning their interpretation of "severe pain" and the reasons for the revisions to the Reagan understanding. Bybee Memo at 19-20. OPR is simply wrong when it asserts that the Bybee Memo drew "primarily" on the Reagan understanding. Report at 184.

[69] As a general matter, given the complex and lengthy history of the CAT's passage, it was more than reasonable for the Standards Memo to address the entire time period in question. The CAT was an unusual treaty, "the product of 7 years of intense negotiations," S. Exec. Rep. No. 101-30 at 2 (1990), most of which occurred during the Reagan administration. As such, an account of the Reagan-era activity provides a crucial prologue to a full discussion of the CAT's ratification history. Indeed, both the Senate Foreign Relations Committee Hearing on the CAT and its eventual report include numerous references to the Reagan understandings OPR believes are unworthy of mention. *See Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 1, 3, 19, 74, 92 (1990) ("Senate Hearing"); S. Exec. Rep. No. 101-30, at 2, 4, 5, 7-8 (1990). Likewise, the Bybee Memo concluded the history by giving due consideration to the role of the Bush administration: quoting the relevant portion of the Bush administration's understanding in its entirety and making clear that the Senate ratified the Bush definition, not the earlier Reagan version. Bybee Memo at 18-19.

184-85. OPR relies on a general statement in the Senate Report explaining that the conditions proposed by the Reagan Administration "'in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide.'" *Id.* at 184 (quoting Senate Report at 4.) But that broad statement sheds no significant light on any differences between the Reagan and Bush Administration's interpretation of "severe pain." There were substantial revisions to the entire "package" of Reagan Administration conditions and the revisions were adopted for a variety of different reasons. *See* Letter from Janet G. Mullens, Assistant Secretary, Legislative Affairs, Department of State ("State Department Memorandum"), Appendix A to Senate Report at 35-38. For example, the Senate Report highlighted the Reagan Administration's refusal to recognize the competence of a monitoring committee established by the Convention as one of three core issues that "deserve[d] comment because [it] relate[d] directly to the basic goal of the Convention." Senate Report at 4-5. In words that echo the passage that OPR cites, the Report explained that "refusal to recognize the committee's competence would send the wrong signal about the seriousness of the U.S. commitment to eliminate torture." *Id.* at 5. In contrast, the understanding of the definition of torture was *not* one of the three core issues Congress highlighted in that section of the report. *Id.* at 4. The fact that the Standards Memo, like the D.C. Circuit, "did not disclose" this quotation is accordingly unsurprising. Report at 184.

Nor is OPR's reliance on *one portion* of the testimony from Abraham Sofaer (the Bush Administration's State Department Legal Advisor) dispositive on this issue. *Id.* at 185-86. Sofaer did tell Congress that the Reagan understanding of the definition of torture, which was modified by the Bush Administration, had been "criticized by some *as possibly* setting a higher, more difficult evidentiary standard than the Convention required." *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 9-10 (1990) ("Senate Hearing") (statement of Abraham Sofaer). But the Bybee Memo discusses the very same passage when considering whether this testimony established that the Reagan and Bush Administration had adopted a materially different definition of torture. Bybee Memo at 18 (explaining that "[t]he Bush Administration said that it had altered the CAT understanding in response to criticism that the Reagan administration's original formulation had raised the bar for the level of pain necessary for the act or acts to constitute torture.") OPR simply ignores the remainder of Sofaer's explanation of the reasons for the change, as well as other evidence of the Bush Administration's intent, and leaps to the conclusion that the Reagan understanding actually set a higher pain threshold merely because Sofaer said it was revised after critics complained that it "possibly[70] set[] a higher ... standard."[71] As the Bybee Memo sets forth, Sofaer noted the criticism but went on to verify that "*no higher standard was intended*" by the Reagan

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[70] Note that OPR conveniently omits the word "possibly" from its quotation of Sofaer's testimony. Report at 185.

[71] OPR apparently assumes that the deletion of words invariably means that those words were disavowed. That is obviously not correct in this context. The Bush conditions deleted more than 50 lines of text in the Reagan conditions related to the definition of torture. *Compare* Senate Report at 9, *with id.* at 13-15. Sofaer emphasized that the Reagan package was viewed as "unusually broad" in scope and that the Bush Administration sought to "simplif[y]" the package and to determine which conditions were actually "necessary." Senate Hearing at 8. By way of example, the Reagan understanding described torture as an "extremely cruel and inhuman act." Senate Report at 15. That phrase was deleted from the Bush understanding but Congress nevertheless echoed that formulation. Senate Report at 6 (torture is "an extreme form of cruel and inhuman treatment"); 8 C.F.R. § 208.18(2) ("Torture is an extreme form of cruel and inhuman treatment.").

Administration understanding. Bybee Memo at 19 (quoting Senate Hearing at 10). Then in other testimony OPR ignores, Mark Richard, the Deputy Assistant Attorney General of the Criminal Division, explained that the Bush Administration had concluded that the Reagan understanding was unnecessary with respect to the meaning of "severe pain" when applied to "physical torture" because there was already a sufficient "consensus" in international law that defined the "essence of torture" as "*excruciating and agonizing physical pain.*" Senate Hearing at 13, 16. Thus Richard explicitly *reaffirmed* the Reagan interpretation of severe pain as applied to physical pain and *nowhere* endorses the view that this benchmark is higher than the Bush Administration's interpretation. Richard further explained that a revised understanding was nevertheless necessary because there was no "satisfactory clarity" for the use of severe pain as the sole definition of "mental pain." *Id.* at 13; *see also id.* at 15 (the primary need for any reservation concerned the "imprecise definition of torture" as applied to "mental anguish"). And this reading of Richard's testimony is buttressed by the memorandum that the State Department transmitted to Congress explaining the reasons for each of the Bush Administration revisions to the Reagan conditions. That memorandum described the "Explanation" for the change in the Reagan Administration's Understanding of the definition of torture as follows: "Revised to clarify the definition of mental harm." Senate Report at 36; *see also id.* at 9 (Sofaer testimony confirming that "the reasons for [the] changes" to the Reagan conditions were explained in the State Department memorandum).

Given OPR's failure to discuss *any* of the evidence of intent set forth in the preceding paragraph (Report at 184-86), its assertion that the Bybee Memo put too much weight on the view that the Bush Administration revisions were intended to "clarify the definition of mental pain" cannot be credited. *Id.* at 185. OPR similarly makes no attempt to reconcile any of this evidence with its apparent conclusion that the history "clear[ly]" established that the Bush Administration adopted a materially different standard for defining the requisite level of pain. *Id.* Unlike OPR, the Bybee Memo did try to make sense of *all* the evidence. There is accordingly no cause to find ethical errors in the Bybee Memo's balanced discussion of this issue merely because it shared the view adopted by the D.C. Circuit but not OPR. *See also* Levin Memo at 8 (disagreeing with this portion of the Bybee Memo's analysis of the ratification history while acknowledging that the Richard testimony provided "some support" for the competing view).

Third, any "errors" in the discussion of this issue were simply not material to the overall conclusions concerning the ratification history or the statutory definition of torture. The OLC authors explicitly acknowledged the competing inferences that might be drawn from the deletion of any reference to "excruciating" and "agonizing" pain in the revised conditions (Bybee Memo at 18), and did not rely on it to inform their definition of the relevant standards. Instead, the memo emphasizes that the key point is "that the prohibition against torture reaches only the most extreme acts," and the question whether "the Reagan standard would have been even higher" is "purely academic" because the "Bush understanding clearly established a very high standard." *Id.* at 19. Consistent with the determination that the issue was "purely academic," the Bybee Memo sets forth its conclusions in the first two pages and explains that OLC has examined the ratification history of the CAT and "conclude[s] that the treaty's text prohibits only the most extreme acts." *Id.* at 1-2.[72] The conclusions do not say that the ratification history establishes that severe pain means excruciating and agonizing. Moreover, neither the Bybee Memo nor the Classified Bybee Memo ever imports the Reagan understanding into their definition of "severe pain" under the statute. The governing standard is repeatedly articulated and applied in the two memos and OLC never once used "agonizing" or "excruciating" to define the relevant threshold of pain. *Id.* at 1, 3, 5, 46; Classified Bybee Memo at 9. By focusing selectively on the Reagan understanding, OPR misses the forest for the trees. The Bybee Memo did not reach a *wrong* answer regarding the CAT's ratification history, let alone the proper interpretation of the statute.

D. United States Judicial Interpretation

OPR concedes that the Bybee Memo "accurately" informed its clients that there had been no reported prosecutions under the anti-torture statute. Report at 186. There was consequently no controlling authority to guide OLC's analysis. The Bybee Memo accordingly turned to cases decided under the Torture Victim Protection Act ("TVPA"), which "supplies a tort remedy for victims of torture," in order to "provide insight into what acts U.S. courts would conclude constitute torture under the [anti-torture] statute." Bybee Memo at 22. The memo then undertook extensive efforts to explain and categorize the types of conduct found to be torture under those decisions and included an extensive appendix detailing the facts at issue in each one. *Id.* at 22-27, 47-50. The memo explained that the list of acts that courts would "likely" characterize as "torture" included severe beatings with instruments, mock executions, burning, electric shocks, rape, and forcing prisoners to witness torture. *Id.* at 24. It also warned that OLC could not "say with certainty that acts falling short of these" would not constitute torture, but that other techniques would have to be "similar to these in their extreme nature" in order to violate the law. *Id.*

Despite OLC's extensive discussion of the authorities (ten single-spaced pages) and its qualified conclusion, OPR takes aim at the *manner of the presentation.* It claims that the Bybee Memo "focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions." Report at 186. It also notes that OLC "fail[ed] to discuss the CAT regulations" and "a relevant body of federal case law that has applied the CAT definition of torture in the context of removal proceedings against aliens"—even though it concedes that "the case law and CAT regulations are generally consistent" with OLC's conclusions. *Id.* at 186-87.

First, before responding to the merits of each of OPR's accusations, it is important to highlight what OPR is *not* saying. OPR is *not* contending that OLC failed to disclose adverse precedent or misinterpreted the TPVA. Nor has OPR identified a *single person* at DOJ or the CIA who ever suggested that there was *anything* wrong with this section, much less raised such concerns to Judge Bybee. Although OPR often compares the Bybee Memo to the Levin Memo when it suits its findings (*e.g.*, *id.* at 130), there is no mention of the Levin Memo in this section. With good reason. That comparison reveals that Levin made different choices in his discussion of the domestic case law, but he provided far less disclosure to the clients about the fact patterns that had been characterized as torture and no less assurance that the standard for proof of torture is very high. Instead of ten pages discussing the case law, he includes just two and a half pages. Levin Memo at 9-10, 15. He cites no case finding that a practice was torture that was not cited in the Bybee memo and omits any discussion of approximately a half-dozen cases discussed in the Bybee memo—all of which held that the conduct in question constituted torture. Further, Levin leads the discussion with a description of two cases holding that the conduct alleged did not rise to the level of torture. He then relegates the discussion of cases finding torture to a string cite (with just four citations) and asserts they suggest the type of "extreme conduct" that falls within the statute. *Id.* at 10. All four of his selections involved heinous, barbaric treatment. *Id.*

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[72] OPR does not suggest this conclusion was unsupported or illogical. *See, e.g.*, Senate Hearing at 16 (Richard testimony confirming that torture is "understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct," as distinct from cruel, inhuman, and degrading conduct).

Second, OPR claims that the Bybee Memo was "inaccurate" when it states that the TVPA cases "generally do not approach" the lowest boundary of what constitutes torture. Report at 188 (quoting Bybee Memo at 27). OPR seeks to refute that statement by pointing to two decisions cited in an appendix to the Bybee Memo—*Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001), and *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78 (D.D.C. 2001), *aff'd in part, rev'd in part, vacated in part* 326 F.3d 230 (D.C. Cir. 2003)—as examples of TVPA cases with "conduct far less extreme" than the case cited in the main text: *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002). Report at 188-89.

Even if OPR were correct that these cases involved lesser forms of extreme conduct, the statement was not "inaccurate." The Bybee Memo states that the cases "*generally*" do not approach the lowest boundary and the case law overwhelmingly supported that characterization. The Bybee Memo appendix reveals a litany of horribly abusive acts, including pistol whipping, electric shocks, cigarette burns, rape, and even murder. Bybee Memo at 47-50.[73] Two exceptions would not alter the "generally" extreme nature of the conduct at issue in the cases.[74] Regardless, *Daliberti* and *Simpson* were district court decisions that would not warrant prominent attention. In *Daliberti*, for example, some plaintiffs had loaded guns placed to their heads, another was threatened with having his fingernails pulled out and his testicles electrocuted,[75] and another was nearly executed by a guard before another guard intervened. 146

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[73] More recent TVPA cases continue to involve extreme conduct. *See, e.g.*, *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375, 387 (E.D.N.Y. 2008) (holding that the plaintiff's allegation that he was subjected to electric shock was "actionable" under the TVPA and "sufficiently heinous that greater detail in pleading is unnecessary"); *Nikbin v. Islamic Republic of Iran*, 517 F. Supp. 2d 416, 425 (D.D.C. 2007) (holding that allegations that defendants hung plaintiff upside down from the ceiling, shocked the soles of his feet with an electrical cable, and assaulted him in the rectum with a coke bottle all constituted torture under the TVPA); *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 264 (D.D.C. 2002) (holding that being "held for fourteen months in cruel, inhuman conditions, denied sufficient food and water, subjected to constant and deliberate demoralization, physically beaten, possibly subjected to gruesome physical torture, and denied essential medical treatment" was torture).

[74] For the same reason, *Daliberti* and *Simpson* do not "contradict" the Bybee Memo's statement regarding the reason courts are not engaging in a careful parsing of the TVPA. Report at 189. OPR quotes selectively from the passage in question, which states in relevant part that "torture *generally* is of such an extreme nature—namely, the nature of acts are so shocking and obviously incredibly painful—that courts will *more likely* examine the totality of the circumstances, rather than engage in a careful parsing of the statute." Bybee Memo at 27. The Bybee Memo made no categorical statement of the kind OPR implies, just an accurate generalization.

[75] Notably, a threat to give electric shocks to a prisoner's genitalia was one of the seven types of conduct that the Bybee Memo singled out as consistently constituting torture. Bybee Memo at 24. As such, it appears that

F. Supp. 2d at 22, 23, 25. These acts caused the plaintiffs to experience psychological injuries (post traumatic stress disorder, personality changes, etc.) of the kind specifically identified in the Bybee Memo as likely to constitute prolonged mental harm. Bybee Memo at 7. As for *Simpson*, the conduct alleged in the plaintiff's complaint was admittedly less severe (the plaintiff was separated from her husband and threatened with death if she attempted to leave), but the D.C. Circuit confirmed *Simpson's* outlier status by unanimously reversing the district court and finding that the plaintiff failed to state a claim for torture based on the acts alleged. *Simpson*, 326 F.3d at 235.

Third, OPR objects to the emphasis given to various TVPA cases, stating that OLC "focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions." Report at 186. Specifically, OPR complains that the Bybee Memo "focused almost exclusively on *Mehinovic v. Vuckovic*, which involved extremely brutal conduct," while "two other cases, in which far less serious conduct was found to constitute torture, were relegated to the appendix and their significance was not fully discussed." *Id.* at 228-29. This is a new low. The Bybee Memo provides detailed descriptions of all the cases at issue and did not contend that some deserved more weight than others (although it surely could have properly done so). As we have explained, far from "downplay[ing]" the supposedly "less severe" examples like *Daliberti* and *Simpson*, OLC cites both cases on the very first page of the appendix, and devotes four full paragraphs to a description of the conduct in *Daliberti*. Bybee Memo at 47-48. Nor was OLC's use of an appendix improper in any way. "Given the highly contextual nature of whether a set of acts constitutes torture," the Bybee Memo reasons, "we have set forth in the attached appendix the circumstances in which courts have determined that the plaintiff has suffered torture." *Id.* at 24. There was no effort to hide or minimize these cases, but rather a concern with efficiency to avoid cluttering the main opinion with decisions that were more properly viewed as a set with a full factual description. This should be unsurprising as OLC has provided annotated decisions in an appendix before. *See, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 203-211 (Nov. 2, 1994) (attaching summaries of opinions relating to the President's authority to decline to enforce laws he believes to be unconstitutional). The Supreme Court also includes appendices of case law on a frequent basis. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2558-61 (2009); *Sprint Commc's Co., L.P. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2546-49 (2008); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 195-198 (2007). For that matter, even OPR is not averse to using appendices. *See* U.S. Dep't of Justice, OIG, OPR, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*, at Appendix (July 2, 2008), *available at* http://www.usdoj.gov/oig/special/s0901/final.pdf.

OPR's criticism also ignores the fact that OLC had valid reasons for selecting *Mehinovic* for inclusion in the main text of the opinion. As the memo explains (Bybee Memo at 24), many of the cases engaged in "limited analysis" (including *Daliberti*) but *Mehinovic* provided an extensive discussion of the relevant legal standards under the TVPA. *See Mehinovic*, 198 F. Supp. 2d at 1343-47. *Mehinovic* also discussed a variety of different types of alleged physical and psychological torture, and reached a number of important issues, including the difference

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the Bybee Memo may have referenced the conduct in *Daliberti* even if not mentioning the name of the case in the main text.

between torture and cruel, inhuman, or degrading treatment that did not rise to the level of torture.[76] *See* Bybee Memo at 25 n.14. Indeed, OLC used *Mehinovic* to *caution* the CIA about the potential for liability. It warns that one of the "guiding principles" drawn from the decision is that "a single incident can constitute torture." *Id.* at 26. The discussion also warned the CIA that the case "demonstrates that courts may be willing to find that a wide range of physical pain can rise to the necessary level" because the court appeared to hold that a single kick to the stomach constituted torture. *Id.* at 26-27. Although OLC expressed its disagreement with that conclusion, it warned its clients nonetheless.

OPR pretends that OLC did not use *Mehinovic* to disclose risks to the clients and suggests that the memo takes the position that the district court "would have been in error" if it had rested on a "single incident" to establish torture. Report at 189-90. The Bybee Memo said no such thing. OLC disagreed with the district court's view that "*this* single act" constituted torture. Bybee Memo at 27. But it concluded "that a course of conduct is unnecessary to establish that an individual engaged in torture" and also identified "teeth pulling" as a single incident that the district court correctly viewed as "clear[] ... torture." *Id.* at 26.

Fourth, OPR asserts that the Bybee Memo "ignored a relevant body of federal case law that has applied the CAT definition of torture in the context of removal proceedings against aliens." Report at 186. Specifically, OPR identifies this "body" of case law as consisting of three Ninth Circuit cases that interpreted CAT's implementing regulations: *Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001), *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000), and *Khanuja v. INS*, 11 Fed. Appx. 824 (9th Cir. 2001) (unpublished). OPR concedes that the Bybee Memo's "failure to discuss the CAT regulations was a relatively minor omission," acknowledging "that the case law and CAT regulations are generally consistent with the Bybee Memo's uncontroversial conclusion that torture is an aggravated form of cruel, inhuman, and degrading treatment." Report at 187. In truth, the CAT regulations are not just "generally consistent" with the Bybee Memo, but directly parallel and support the interpretation of the CAT that OLC adopted. *See supra* Section IV.A.2 (citing 8 C.F.R. § 208.18(a)(5)). As such, there was no need for the Bybee Memo to provide cumulative support beyond its citation to the statutory language.

Regarding the Ninth Circuit cases, even OPR admits that the Bybee Memo cited *Al-Saher* in the appendix, albeit without reference to the duplicative CAT regulations.[77] Report at 187 n.140. The opinion in *Cornejo-Barreto* is wholly inapposite, citing the State Department extradition regulations at 22 C.F.R. §§ 95.2-95.3 and not the torture definition provided at 22 C.F.R. § 95.1(b). 218 F.3d at 1011-12. The court in *Cornejo-Barreto* did not characterize the alleged conduct at issue and thus the case does not, as OPR claims, "provide [an] additional example[] of how courts have distinguished between torture and less severe conduct." Report at 187.

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[76] As a comparison, the Levin Memo included an extended discussion of the standard of "prolonged mental harm" as construed in *Mehinovic*. Levin Memo at 15. But OPR makes no finding that the Levin Memo thereby erroneously focused on cases with more extreme conduct.

[77] OPR neglects to mention that while *Al-Saher* cites the CAT regulations in passing, it also includes a summary of "torture techniques" that is much more in line with the conduct described in *Mehinovic* than cases like *Simpson*. *See Al-Saher*, 268 F.3d at 1147 ("According to former detainees, torture techniques included branding, electric shocks administered to the genitals and other areas, beating, burning with hot irons, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denials of food and water, and threats to rape or otherwise harm relatives.").

Finally, as Attorney General Mukasey, Deputy Attorney General Mark Filip, and Judge Bybee previously made clear to OPR (Mukasey Letter at 6; Bybee Draft Response at 50), citing an unpublished, two-page opinion like *Khanuja* was a dubious matter at best and could not have been cited as precedent in the Ninth Circuit. Indeed, doing so was potentially subject to sanction.[78] *See Hart v. Massanari*, 266 F.3d 1155, 1159, 1180 (9th Cir. 2001) (describing an order to show cause why an attorney should not be sanctioned for citing an unpublished Ninth Circuit opinion). In any event, *Khanuja* has never been cited by *any* court. Yet OPR refuses to give an inch even on such shaky ground, claiming that it cites *Khanuja* "not as precedent, but as an example of a judicial decision that applied the CAT regulations and which was available to the drafters of the Bybee Memo." Report at 187 n.141. OPR adds that it "note[d] the omission" because OLC's memoranda "demanded the highest level of thoroughness, objectivity, and candor." *Id.* at 187. This ignores both common sense and the rationale for the rule disfavoring unpublished opinions, which Judges Kozinski and Reinhardt explain are typically "drafted by law clerks with relatively few edits from the judges." Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, California Lawyer, June 2000, at 43, 44. Kozinski and Reinhardt concluded: "Based on our combined three decades of experience as Ninth Circuit judges, we can say with confidence that citation of [memorandum dispositions] is an uncommonly bad idea. We urge lawyers to drop it once and for all." *Id.* at 81. No duty—including the "highest level of thoroughness"—demands that OLC cite cases that the authoring court has stated are of no precedential value. OPR's persistence in citing *Khanuja* demonstrates its single-mindedness in pursuit of even the most trivial criticism.

Regardless, as OPR admits (Report at 187), cases like *Khanuja* and *Cornejo-Barreto* add little new to the CAT's definition of torture and thus would have been redundant. This may be why the Levin Memo cites *none* of these Ninth Circuit cases, or the CAT regulations for that matter. The Bybee Memo already reviewed *fourteen* relevant cases, which effectively showed the range of conduct courts considered to be torture. Two extra citations would have added little to no additional value to the discussion. At root, there is no basis for OPR to second-guess the discretionary decision of when additional citations will produce only diminishing returns.

E. International Decisions

Much like its criticism of the Bybee Memo's treatment of U.S. judicial interpretation, *supra* Section IV.D, OPR faults OLC's discussion of two international decisions—*Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (sec. A) 41 (1978) ("*Ireland*"), and *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999) ("*Israel*")—for "ignor[ing] several important facts," failing to consider "a body of ... case law," and making "misleading" assertions. Report at 191-94. But there is again no suggestion that Philbin or anyone else involved in the review of OLC opinions on this subject ever shared OPR's view or brought such concerns to Judge Bybee's attention. OPR's grievances ultimately boil down to complaints about drafting that OPR elsewhere concedes cannot be attributed to the AAG. *Id.* at 257. From Judge Bybee's perspective, OLC properly analyzed two cases that the CIA *specifically requested* guidance on.[79] *Id.* at 41. Judge Bybee surely did not have to research additional cases by the European Court of Human Rights or second-guess his staff's interpretation of those decisions.

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[78] As of 2002, Ninth Circuit rules provided that "[u]npublished dispositions ... are not binding precedent." In 2006, the Federal Rules of Appellate Procedure were amended to permit citation of unpublished decisions. Fed. R. App. P. 32.1(a). Nevertheless, the current Ninth Circuit rule provides that "[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." 9th Cir. R. 36-3.

1. *Ireland v. the United Kingdom*

The Bybee Memo cites *Ireland* because it is the "leading European Court of Human Rights case explicating the differences between torture and cruel, inhuman, and degrading treatment or punishment." Bybee Memo at 28. Specifically, the *Ireland* Court considered the legality under Article 3 of the European Convention on Human Rights and Fundamental Freedoms ("European Convention") of five specific interrogation techniques: wallstanding, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink. As OPR concedes, the Bybee Memo provides a "detailed discussion" of these techniques (Report at 191)—some nearly identical to the methods analyzed in the Classified Bybee Memo—noting that the Court found they could cause "acute psychiatric disturbances during the interrogation" and break the "physical or moral resistance" of prisoners. Bybee Memo at 29. OLC also accurately recounts the Court's conclusion "that these techniques used in combination, and applied for hours at a time, were inhuman and degrading but did not amount to torture." *Id.* at 29. Nevertheless, rather than accept OLC's balanced and *correct* analysis of a plainly relevant decision, OPR resorts to petty complaints about the Bybee Memo's failure to include tangential facts and citations. None has merit.

First, OPR contends that the Bybee Memo should have mentioned some or all of the following facts: (a) The European Court reversed the report and findings of the European Commission of Human Rights ("the Commission"), which decided that the combined use of the five interrogation techniques constituted torture; (b) The United Kingdom did not contest the Commission's findings that the interrogation techniques constituted torture; (c) A committee formed by the United Kingdom prior to the Commission's investigation reached a split decision on whether the techniques needed to be ruled out on moral grounds, but agreed that they were illegal under domestic law; (d) The United Kingdom renounced further use of the techniques following the committee's report but prior to the Commission's investigation; (e) Four judges on the 17-judge European Court panel thought that the techniques constituted torture; (f) The European Court majority found that although the techniques were not torture, they still violated the European Convention. Report at 191-92. OPR thus advances the bizarre notion that it is professionally incompetent to cite an appellate opinion without also referencing the dissenting judges (whose view was the distinct minority in a 13-4 vote), holdings below (including the Commission's findings that were *overruled*), and facts beyond the record of the case. There is no such obligation.[80] *See Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998) ("dissenting votes have no precedential authority"); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 56 (7th Cir. 1980) (reversed case is "no longer the law"). Indeed, not one of these facts would have altered the Bybee Memo's analysis or conclusions in any way. If anything, the fact that the United Kingdom did not contest the Commission's findings lends *greater* weight to the European's Court ultimate reversal. The absurdity of OPR's expectations is further highlighted by the Levin Memo, which referenced *Ireland* in a footnote, but included *none* of the facts demanded by OPR and *none* of the detail provided by the Bybee Memo. Levin Memo at 7 n.14. The Second Circuit likewise cited *Ireland* without mentioning *any* of the facts that OPR requires. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 n.16 (2d Cir. 1980). In any event, it was reasonable for Judge Bybee to rely on his team's characterization of *Ireland*, which was correct, without inquiring into the case's procedural history and possible changes to the United Kingdom's interrogation policy.

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[79] Put in the proper context of the CIA's request, OLC was hardly opining on "what constituted torture 'under international law,'" as OPR asserts. Report at 191 n.145 (quoting Bybee Memo at 31). Rather, the concluding paragraph of this section makes clear that OLC was discussing how two courts decided two particular *cases* under international law and adopted a very restrictive interpretation of what amounts to torture. The Bybee Memo earlier noted that these two international decisions provided only "guidance about how other nations will likely react to our interpretation," not a definitive account of international law. Bybee Memo at 27 (noting also that the opinions are "in no way binding authority upon the United States"). Regardless, even if OPR were trying to use *Ireland* and *Israel* as indicia of what is permissible under international law as a more general matter, this would not be improper. The exhaustive summary of international jurisprudence that OPR recommends—including "*all* relevant international treaties, agreements, and declarations" and "the laws, practices, and judicial decisions of other nations" (Report at 191 n.145)—would be utterly unworkable and largely irrelevant to the primary question at hand. OPR's contention is akin to saying that its report is not thorough because it fails to include a 50-state survey of every bar disciplinary proceeding, Rule 11 sanction decision, ineffective assistance of counsel case, and legal malpractice decision.

Second, OPR also argues that the Bybee Memo should have included a discussion of post-*Ireland* case law that even OPR admits generally supports little more than the "uncontroversial conclusion that the term 'torture' should be applied to more severe forms of cruel, inhuman and degrading treatment." Report at 192 & n.147. But there is no authority that requires citation to every single case following a landmark decision, particularly when the subsequent precedent merely echoes the holding that came before. OPR identifies a single case, *Selmouni v. France*, 66 Eur. Ct. H.R. (1999), as worthy of special mention because it allegedly "raised questions about the continuing validity of the European Court's findings in *Ireland*." Report at 192-93. *Selmouni* did nothing of the sort. In fact, *Selmouni* cites *Ireland* with approval multiple times, *see Selmouni v. France*, No. 25803/94, Council of Europe: European Ct. of Human Rights ¶¶ 88, 95, 96, 99 (July 28, 1999), including for the proposition that (pursuant to *Ireland*) the European Convention requires the Court to give proper regard to the distinction between torture and inhuman or degrading treatment. *Id.* at ¶ 96. The fact that *Selmouni* cautioned, in *dicta*, that acts classified as "inhuman and degrading" in "the past" could "be classified differently in [the] future" (Report at 192-93 (quoting *Selmouni* at ¶ 101)) cannot reasonably be read to undermine *Ireland* in a manner that required discussion. The passage never mentions or questions the *Ireland* decision and it plainly remained the law of the European Court.

OPR also contends that *Selmouni* had to be discussed because it cited the CAT definition of torture and cruel, inhuman, and degrading treatment. Report at 192. But the European Court expressly reserved the issue, stating that "it remains to establish in the instant case whether the

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[80] OPR itself falls far short of this imaginary standard even in this very section of its report; both *Aydin v. Turkey* and *Aksoy v. Turkey* were split decisions (decided 16-5 and 8-1, respectively) and yet OPR makes no mention of the dissenting votes. Report at 192.

'pain or suffering' inflicted on Mr. Selmouni can be defined as 'severe' within the meaning of Article 1 of the United Nations Convention." *Selmouni* ¶ 100. And OPR once again ignores the fact that the Levin Memo cites *none* of the cases—including *Selmouni*—that OPR believes are part of the relevant "body of post-*Ireland* case law from the European Court." Levin Memo at 6-7. It becomes all too plain that OPR is taking advantage of scholarly literature written well after the Bybee Memo (*e.g.*, OPR Report at 192 n.146 (citing Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1705-06 (2005)) to retroactively assign responsibility for obscure facts and cases that no one at OLC was aware of or brought to Judge Bybee's attention. The simple fact is that *Ireland* was the key European Court decision on point and OLC described its primary holding in a detailed and responsible manner. Nothing more was needed or required.

2. *Public Committee Against Torture in Israel v. Israel*

The Bybee Memo cites *Israel* as an additional example of an international court "consider[ing] whether ... a program of interrogation techniques was permissible." Bybee Memo at 30. In *Israel*, the Israeli Supreme Court examined the legality of five interrogation techniques, including shaking, the "Shabach" (a combination of hooding, exposure to loud music, and stress positions), the "Frog Crouch" (a stress position), excessive tightening of handcuffs, and sleep deprivation. Bybee Memo at 30. Given their obvious similarity to some of the techniques in the Classified Bybee Memo, OPR does not dispute the relevance of *Israel*, but rather objects to the Bybee Memo's statement that the case is "best read as indicating that the acts at issue did not constitute torture." Report at 193 (quoting Bybee Memo at 30). Based on an examination of *Israel*, OPR concludes that the Bybee Memo's argument on this issue "was not based on the actual language and reasoning of the court's opinion, and was intended to advance an aggressive interpretation of the torture statute." *Id.* at 196. OPR's criticism is exaggerated and certainly not properly attributed to Judge Bybee in any event.

First, the Bybee Memo did not hide the primary holding of *Israel* or mask the qualified nature of OLC's interpretation of the case. Immediately after recounting the relevant facts, the Bybee Memo states (correctly) that the Israeli Supreme Court "concluded that these acts amounted to cruel and inhuman treatment." Bybee Memo at 30. The memo also states (correctly) that the Court "did not expressly find that [the acts] amounted to torture." *Id.* Such a finding was "unnecessary," OLC notes, because the Court's holding sufficed to prohibit the acts in question. *Id.* "Nonetheless," the Bybee Memo continues, "the decision is still *best read* as *indicating* that the acts at issue did not constitute torture." *Id.* In this way, the memo alerted the reader that OLC was drawing an interpretive inference and not describing a holding of the court.

Nor is OPR correct that there was "no basis" for OLC's inference. Report at 195. There is certainly room for disagreement, but there was a "basis" for the statement. As the Bybee Memo accurately explained, the court repeatedly chose adjectives to describe the practices at issue that would not generally be associated with pain of "sufficient severity to reach the threshold of torture." Bybee Memo at 30. *See Israel* 38 I.L.M. 1482-84 (observing that some of the techniques "harm[] the suspect's body," "violate[] his dignity," "cause[] pain to his back," "degrade[] him," and "give[] rise to particular pain and suffering"). That choice of language can be read to suggest that the court did not want to convey the impression that these practices rose to the level of torture. This interpretation of the court's choice of language is buttressed by the

Bybee Memo's observation that the *Israel* Court affirmatively relied upon the decision in *Ireland* as support and did not question its holding. *Id.* This is not baseless legal reasoning.

Second, there is no evidence that Judge Bybee ever had any reason to question the accuracy of this statement. OPR relies on an email exchange between Yoo and [redacted] to support its conclusion that the authors "knew the Israeli court's opinion did not provide support for their position" but persisted in this characterization which "was *intended* to advance an aggressive interpretation of the torture statute." Report at 196. OPR makes far too much of an email exchange that reflects [redacted] view at one moment in time. *Id.* ("In his comments, Yoo wrote to [redacted] '[i]sn't there some language in the opinion that we can characterize as showing that the court did not think the conduct amounted to torture?' [redacted] responded, 'Unfortunately, no.'"). It is commonplace for lawyers working together to debate points of law and shift ground as the debate continues. In any event, Judge Bybee was not a party to the exchange and no one ever raised the issue with him. As OPR concedes, Judge Bybee was "not responsible for checking the accuracy and completeness of every citation, case summary, or argument" (*id.* at 257) and that includes OLC's description and interpretation of *Israel.*

F. Commander-in-Chief Power

In addition, the Bybee Memo addresses the scope of the President's Commander-in-Chief powers to conduct interrogations of enemy combatants. OLC determines that the Commander-in-Chief powers delegated by Article II vest the President with the "power to ensure the security of the United States in situations of grave and unforeseen emergencies," Bybee Memo at 37, including the "constitutional authority to order interrogations of enemy combatants," *id.* at 31. OLC concludes that the statute, "as applied to interrogations of enemy combatants *ordered by the President* pursuant to this Commander-in-Chief power would be unconstitutional." *Id.* at 39. It reasons that "[j]ust as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence *he believes* necessary to prevent attacks upon the United States." *Id.* at 31.

Judge Bybee recognizes that certain portions of the analysis would benefit from additional clarification, and he deeply regrets that the section was not more precisely written. With additional time, Judge Bybee believes that OLC would have had a more fulsome discussion of the difficult separation of powers issues in this area. Such a discussion might have avoided some of the public criticism of OLC that arose when the Bybee Memo was publicly released without the benefit of the Classified Bybee Memo and an understanding of the context for the memos. At the time, however, Judge Bybee made the reasonable judgment that, even though it was important to respond to the client's inquiries, it was critical to avoid delay or to detract from OLC's core advice by "[o]verblow[ing]" the issue. Bybee Tr. 89. The core conclusions in this section, however, reflect reasonable answers to difficult, unsettled questions of law. OPR did not—and cannot—find that no reasonable attorney or jurist could agree with the conclusions or that Judge Bybee somehow acted recklessly or in bad faith.

OPR launches a bevy of meritless attacks on the Bybee Memo's legal judgments, as summarized here:

- *First*, contrary to OPR's suggestion (Report at 198-99), it was wholly appropriate for OLC to include this discussion in the Bybee Memo. The client wanted the information, and OLC properly responded to its request. OLC did not (and could not) just insert it to improperly provide blanket immunity, and the client did not so interpret the discussion. Rizzo Letter ¶ 5. Goldsmith's initial concerns about a "blank check" were prompted by the Yoo Memo (Report at 111-113, 117-20, 205, 233), which was issued to DoD *without* an accompanying narrow techniques memo.

- *Second*, OPR strains to read the Bybee Memo in the most unfavorable light, giving it an unnecessarily broad meaning that neither the authors nor the client contemplated. Report at 205-06. In fact, Rizzo read the section as referring to "interrogations personally ordered by the President." Rizzo Letter ¶ 5.

- *Third*, OPR condemns OLC's constitutional conclusion as, variously, "not a mainstream view," "wrong," and not "thorough, objective, and candid legal advice." Report at 122, 199, 201. Even (contrary to all available evidence) were OPR equipped to join issue on such weighty constitutional matters, it is decidedly not OPR's role to impose its own legal and policy judgments. *In re Stanton*, 470 A.2d at 287. Moreover, OPR nowhere asserts that no reasonable jurist or attorney could agree with the Bybee Memo. The Bybee Memo reasonably applies well-established principles.

- *Finally*, OPR criticizes OLC for not including a discussion of *Youngstown* (in particular, Justice Jackson's concurrence), for choosing to incorporate by reference OLC's past discussions of Congress's constitutional powers rather than rehashing them in this memo, and for leaving unsaid the long-established executive branch position that the President cannot "take care" to enforce an unconstitutional law. Report at 202, 204. In doing so, OPR ignores the fact that this was the latest chapter in a continuing dialogue among sophisticated executive branch attorneys. Moreover, OPR has inexplicably failed to examine *any* of OLC's prior opinions from prior administrations, which is clearly the most appropriate way to judge whether OLC attorneys' performance is "commensurate" with "other lawyers in similar matters" (D.C. Rule 1.1).

In short, properly interpreted and viewed in context, OLC made reasonable judgments and nothing OPR proffers supports its findings of reckless misconduct.

1. OLC appropriately included a Commander-in-Chief discussion

As a threshold matter, it is perfectly appropriate for OLC to give such legal advice upon request or even just to "'give the full scope of advice'" (Report at 50) if it is in the client's interest—and there is ample evidence that it was requested or, at the very least, welcomed by the client. *See id.* at 50-52; *supra* Section II. Indeed, Addington testified under oath that Yoo included the sections on defenses and Commander-in-Chief authority because it was "what his client asked him to do." DOJ Hearing, Part III at 42 (testimony of David Addington).[81] Similarly, in response to a question from Philbin regarding inclusion of the sections, Yoo stated that "they want it in there." Report at 51, 197. And the Bybee Memo itself refers to "your request for advice" on the Commander-in-Chief issue. Bybee Memo at 31. This is consistent with the fact that, although Yoo had affirmatively made the decision *not* to address the issue, after a July 16, 2002 meeting with White House officials, including Gonzales, Addington, and Flanigan, Yoo did an about-face and asked [redacted] to begin drafting the new sections on the Commander-in-Chief authority and possible defenses. Report at 49-50; *see also* Email from Yoo to [redacted] (July 18, 2002) (stating that, after discussing it with others, he has "a good idea about how we are going to do it now"). The most natural reading of these events is, as Addington confirmed, that the client wanted those topics included. *See* Report at 52 (someone at the July 16 meeting "requested the additions").

There is nothing remotely improper about answering such requests. That is OLC's role. Indeed, the ethics rules *encourage* OLC to provide whatever information the client wants. Rule 1.4 cmt. [2] ("A client is entitled to *whatever information the client wishes about all aspects of the subject matter* of the representation unless the client expressly consents not to have certain information passed on.").[82] Also, if the client wants to know about an issue it is of no moment that someone else, such as Yoo, brought the issue to the table. *See id.*; *see also* Report at 199 (stating that Yoo "may have added the discussion in response to a question from the CIA"). But even if it had not been requested or desired—indeed, even if affirmatively *unwanted*—OLC could *still* offer the advice if, in its opinion, OLC believed it was in the client's best interest. *See* Rule 2.1 cmt. [5] ("A lawyer ordinarily has no duty to … give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest."); *see also, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 199 ("I have reflected further on the difficult questions surrounding a President's decision to decline to execute statutory provisions that the President believes are unconstitutional, and *I have a few thoughts to share with you.*"). Here, there is plainly a rational connection between the interpretation of a criminal statute and possible defenses to that same statute and OPR has not attempted to show that OLC did not believe inclusion of those sections was in the client's interest. In short, regardless of who raised the issues or requested their inclusion, it is in no way improper for OLC to address them in the Bybee Memo.

Nonetheless, OPR maintains that it was somehow professionally irresponsible to address such questions, intuiting based on the "sequence of events" that OLC improperly added such sections simply to "to achieve indirectly the result desired by the client"—immunity—and thereby circumvent the Criminal Division's refusal to provide advance declinations. Report at 197-99, 205-06, 228.

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[81] In its Draft Report, OPR did not even acknowledge this highly relevant testimony. *See* Draft Report at 31, 156 (noting only that Addington told Yoo that he was "glad you're addressing these issue").

[82] Although Gonzales and others later called the sections "unnecessary," *see Press Briefing by White House Counsel Judge Alberto Gonzales et al.* (June 22, 2004); *Confirmation Hearing on the Nomination of Alberto Gonzales to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 109 133 (Jan. 6, 2005) (testimony of Gonzales), this does not contradict the evidence that someone else encouraged or welcomed their inclusion. *See* Report at 51, 198 (Gonzales did not remember how the sections came to be in the memo but "mentioned that David Addington" might have been involved).

First, this is pure speculation, devoid of any compelling evidence whatsoever, dependent on reading the facts in the most negative light and jumping to unsupported conclusions. OPR has not come close to demonstrating by a preponderance of evidence (let alone "clear and convincing" evidence) that OLC included the new sections for any reason other than that the client wanted an answer and that it provided more complete advice. *See supra* Section II. Moreover, Judge Bybee has categorically denied writing the Bybee Memo to give the CIA carte blanche to do whatever it wished, Bybee Tr. at 112-13, and Philbin has emphatically concurred, [redacted] (stating that there was "no evidence" that Bybee or Yoo "intended the analysis in the Bybee Memo to provide, in effect, an immunity to CIA operatives" and Philbin "believes that this accusation is unjust"); Report at 199. Had OLC so intended, the Classified Bybee Memo, which was strictly limited to the facts presented and nowhere mentioned OLC's Commander-in-Chief holding, would have been superfluous.

Second, OPR misunderstands the basic functional differences between advance declinations (meaning a commitment not to bring a prosecution) and the issues addressed in the Bybee Memo. The Commander-in-Chief section never advised CIA officials that they would be immune from prosecution no matter what they did. To the contrary, the Standards Memo explained that this section was only addressed to interrogations "ordered by the President" and to the interrogations "*he* believes necessary to prevent attacks upon the United States." Bybee Memo at 39. Even with this significant qualification (that may have excluded everyone), no one was or could be assured that DOJ would refuse to prosecute based upon the opinion. OLC did not (*and could not*) purport to bind future Justice Departments, juries, or courts, any one of which could (as DOJ subsequently *did*) reject OLC's analyses on these issues. Assuring CIA agents that if they acted pursuant to a Presidential order that they would not be prosecuted as long as future DOJ officials agreed with the OLC opinion is a far cry from blanket "immunity" or a reliable "shield." Report at 197, 199; *see supra* Section II.F.

Also, OPR offers no evidence whatsoever that the CIA misinterpreted the Bybee Memo or that any agent ever conducted an interrogation based on the belief that OLC had assured him that he would be immune from prosecution. Indeed, the White House, Rizzo, and others have confirmed that they *only* relied on the narrower Bybee Classified Memo, not on the Bybee Memo's Commander-in-Chief discussion. *See supra* Section II.[83] For example, Rizzo recently confirmed that, as a client, he in no way viewed the Commander-in-Chief discussion as attempting to "give the CIA carte blanche to inflict torture" or to confer "a form of 'immunity.'" Rizzo Letter ¶ 5. Moreover, he believes that the Bybee Memos did not "create[] any such risk." *Id.* Indeed, as Philbin noted, "there was *no reasonable basis* for thinking that the Bybee Memo would be independently used for anything outside the corners of the Classified Bybee Memo." [redacted] The implicit effort to link Judge Bybee's good faith work product with unauthorized abuses that may have occurred somewhere in the world is thus extraordinarily unfair.[84]

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[83] *See also Press Briefing by White House Counsel Judge Alberto Gonzales et al.* (June 22, 2004) (confirming that the section was "not relied upon by decision-makers"); Letter to senator Patrick Leahy from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, at 3 (July 1, 2004) ("unnecessary for any specific advice provided by the Department"); Draft Report at 180 n.169 (conceding Rizzo believed the Bybee Memo was not "essential" for CIA's purposes); Rizzo Letter ¶ 5.

2. The Bybee Memo clearly only addresses Presidential orders made pursuant to the Commander-in-Chief Power

OPR argues that the Bybee Memo concludes that the statute "could not be constitutionally applied to the CIA interrogation program" and does not "condition" that conclusion "on the issuance of a direct order from the president." Report at 205; *see id.* at 232. OPR seizes (at 200, 202, 203, 232 n.190) on one sentence in the Bybee Memo that, viewed in isolation, could be read to suggest that Congress has no power to criminalize *any* interrogations. *See* Bybee Memo at 39 ("Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."), *language withdrawn*, Bradbury 2009 Memo at 3 (Jan. 15, 2009) (withdrawing two "specific assertions").[85]

Properly viewed as a whole, however, the memo's holding is much more narrowly confined to a power that the President invokes personally and only when it is pursuant to his proper Commander-in-Chief Authority; a field agent could hardly deign to speak on his behalf. Although Yoo has indicated that this point could have been made more clearly, DOJ Hearing, Part III at 10-17 (testimony of Yoo), a point with which Judge Bybee agrees, it was nonetheless the underlying intent of the authors. Moreover, and most importantly, a key client, Rizzo, "interpreted the Commander-in-Chief section to refer to interrogations personally ordered by the President." Rizzo Letter ¶ 5. The text of the memo firmly supports this common understanding. *See* Bybee Memo at 31 (stating that "*the President* has the constitutional authority to order interrogations of enemy combatants"); *id.* at 35 (stating that the statute applies to officials "carrying out *the President's* Commander-in-Chief powers" and "aiding the President in exercising *his* exclusive constitutional authorities"); *id.* at 39 ("Congress can no more interfere with *the President's* conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield"). Indeed, the Bybee Memo emphatically describes the scope of its conclusion on this issue in the following terms: "Section 2340A, as applied to interrogations of enemy combatants *ordered by the President* pursuant to his Commander-in-Chief power would be unconstitutional." *Id. Cf.* Report at 206 (incorrectly asserting that there is only a "single reference" to the President's personal involvement); *id.* at 232 n.190 ("sole reference").

In addition, the Bybee Memo analogizes to a 1984 opinion in which OLC determined that a criminal contempt statute cannot constitutionally apply to an official asserting a claim of

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[84] Although OPR cites Goldsmith's criticisms, his concerns about a "blank check" were initially prompted by the Yoo Memo, which was issued *to the Defense Department* and without an accompanying narrowly-tailored memo, such as the Bybee Classified Memo, to make clear the metes and bounds of the advice. *See* Report at 112 (Goldsmith "saw *the Yoo Memo* as a 'blank check' [for DoD] to create new interrogation procedures without further DOJ review or approval"); *see also* Report at 111-113, 117-20, 205, 233; *cf.* Report at 227.

[85] Tellingly, Bradbury did not withdraw the *entire* Commander-in-Chief discussion, but only certain "specific assertions." Bradbury 2009 Memo at 3; *see id.* ("I do not find *that statement* persuasive."); *id.* at 4 (disagreeing with "the *assertions excerpted above*"); *id.* at 11 (disagreeing with "the *propositions highlighted*"). Goldsmith's criticisms also focused on that same statement. Goldsmith, *The Terror Presidency* at 148-49.

Executive Privilege. *See Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*, 8 Op. O.L.C. 101, 129, 134-35 (May 30, 1984) ("*Olson 1984 Opinion*") (holding that the criminal contempt of Congress statute cannot constitutionally apply to "an Executive official who asserts, *on direct orders of the President*, the President's claim of executive privilege" (capitalization omitted)); *see also id.* at 135 ("*Presidential* assertions of executive privilege"); *id.* at 137 ("*Presidential* command"). This analogy further demonstrates that, as with the executive privilege opinion, the Bybee Memo primarily concerned with an assertion of executive authority invoked personally by the President.[86]

Furthermore, Judge Bybee confirmed that the best reading of the memo is more narrow than OPR contemplates when he stated that the memo did not hold the statute was unconstitutional "on its face"—or even as to all interrogations—but merely that it "might be unconstitutional as applied ... in certain applications on the battlefield." Bybee Tr. at 83. Also, he acknowledged that, relevant to the analysis of such an as-applied challenge was whether it is "a direct order from the president" or instead "somebody way, way, way down the chain of command." Bybee Tr. at 86. To be sure, Judge Bybee stated that the memo does not fully address (or foreclose) the possibility that the statute might be unconstitutional in circumstances *other* than a direct order from the President, Bybee Tr. at 88-89 ("Q: Would this require a direct order from the president? A: Well, we haven't explored that in this memorandum. ... We haven't reached that level of specificity."); *see* Report at 205-06, 232. The point is simply that, on its face, the memo only *clearly* covers the scenario in which the President is directly involved in ordering the interrogation and in which the interrogation is in furtherance of his Commander-in-Chief authority. Put differently: it is highly unlikely anyone reading the memo would have tested the limits of the theory and risked criminal sanctions without a direct order from the President.

OPR contends that the Bybee Memo "was inadequate to make it clear to the reader that such an order was required." Report at 232 n.190. Although a hypothetical "reader" (say, an academic or a commentator) could interpret the memo in any number of ways (much as one can deconstruct any legal opinion), as a practical matter, it was "'perfectly clear for people who work in this area.'" *Id.* at 206 n.159 (quoting Yoo). Indeed, as noted, Rizzo confirmed to us that he interpreted the Commander-in-Chief discussion as referring to interrogations personally ordered by the President. *See* Rizzo Letter ¶ 5; *supra* at Sections II.F, IV.F.1. And, even were the Bybee Memo intended as some sort of field manual (it was not),[87] no rational line interrogator could view it as an "advance declination" or a blanket "immunity" that individuals could invoke on their own accord. *See supra* Section II.E-F. As even OPR's lead attorney (at the time) [redacted] recognized, that would "obviously" be "a gross distortion" of the Bybee Memo. Bybee Tr. at 90.

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[86] In past memos, the Bybee and Yoo have made clear that the President cannot wantonly ignore statutes. *See, e.g.*, *Transfer Opinion* at 25 (Section 2340A "could apply to [presidential] transfers if they were deemed to be part of a conspiracy to commit an act of torture abroad"); Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, *Authority of the President to Suspend Certain Provisions of the ABM Treaty* 20 (Nov. 15, 2001) (The President cannot "wholly terminate ... a statute.").

[87] And, of course, Judge Bybee did not intend or expect the Bybee Memo to be widely distributed to CIA agents in the field at all. *See* Bybee Tr. at 89 ("It was very, very closely held, even inside my office. I would be very, very surprised, very disappointed if it was distributed outside of the narrow range for which it was intended."); *supra* Section II. He could not purport to control what the client (i.e., the CIA) does with the advice, so it is of no moment that the [redacted]

3. The Bybee Memo adopts a reasonable view on unsettled questions of law

OPR apparently concedes that the Bybee Memo's ultimate conclusion is reasonable, but instead faults OLC for being "wrong," for not being "mainstream," and for not being "thorough, objective, and candid." Report at 122, 199, 201. Although Judge Bybee agrees that the Bybee Memo's Commander-in-Chief discussion was not as clear or as complete as it could have been, that shortcoming hardly rises to an ethical violation.[88] As discussed below, its conclusions, *even if* "wrong" or not "mainstream," were nonetheless reasonable.

Initially, OPR did not contend that OLC's Commander-in-Chief conclusion is wrong (let alone recklessly so), unreasonable, or made in bad faith, only that the memo should have said more: it was "not adequately supported by authority." Draft Report at 157; *see also id.* at 159 ("*[w]hatever the merits*" of OLC's position, "it was not based on a thorough discussion of all relevant provisions of the Constitution"). Now, in a fit of *ipse dixit*, OPR has in the last three months decided that the Bybee Memo's conclusion that the anti-torture statute "does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority" was, after all, "wrong" and, in any event, "most certainly did not constitute thorough, objective, and candid legal advice." Report at 201.[89] OPR breezily resolves this weighty issue (on which no court has passed) in a mere three sentences and a handful of citations to a foreign court and two scholarly works:

> Torture has not been deemed available or acceptable as an interrogation tool in the Anglo-American legal tradition since well before the drafting of the United States Constitution. The Bybee Memo cited no authority to suggest that the drafters of the Constitution (or anyone else) believed or intended that the President's Commander-in-Chief powers would include the power to torture prisoners during times of war to obtain information. *Thus*, the Bybee Memo's conclusion that the torture statute "does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority" *was wrong* and most certainly did not constitute thorough, objective, and candid legal advice.

Id. (citations omitted).

This is not a serious analysis. ***First***, it is clearly not OPR's role to substitute its preferred (truncated) analysis and constitutional conclusions, and thereby "put [itself] in the position of a sort of court of appeals from lawyers' judgments," *In re Stanton*, 470 A.2d at 287. Indeed, absent a showing of "*total inattention or incompetence*" (which OPR does not even attempt to make), a disciplinary body must "*[n]ever* be in the business of assessing the correctness of the lawyer's advice to the client." *Id.* at 287.[90] *Second*, OPR proceeds from the faulty premise that the Commander-in-Chief discussion authorizes "torture." Report at 201.[91] Insofar as OPR is referring to the statutory definition, it is simply mistaken. If the statute is unconstitutional as applied to certain actions then, by definition, those actions *are not* statutory torture. (If a defendant is acquitted of murder because a state statute is held to be unconstitutional, the defendant did not commit statutory murder.) Insofar as OPR is referring to general notions of torture (international *jus cogens* or otherwise), it is irrelevant, as the Bybee Memo only addresses the statutory definition. *See* Bybee Tr. at 105.[92]

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[88] In any case, it is undisputed that this potential power was not the basis for OLC's advice in the Classified Bybee Memo (and indeed was not mentioned in that memo) and *was never relied upon* by the prior administration. Moreover, had it been intended as a sweeping immunity from the statute, the remainder of the Bybee Memo would have been irrelevant, and the Classified Bybee Memo unnecessary.

[89] Elsewhere in the Final Report, OPR disclaims that it evaluated OLC's conclusions on the merits.

OPR also criticizes OLC for not adopting a "widely-held view[]" as to the scope of executive power. Report at 228; *accord id.* at 122, 199; Draft Report at 157 (arguing OLC takes "a minority view, one that does not acknowledge or address more widely-held, mainstream views as to the scope of executive power"). Even accepting that OLC took a minority view, it is nonetheless defensible in its conclusions and has garnered support. Professors Posner and Vermeule, for example, recognize that OLC's analysis "falls well within the bounds of professionally respectable argument" and Professor Paulsen, a former OLC attorney and a widely-published expert on war powers,[93] has argued that the Bybee Memo "is almost certainly correct" in concluding that the President has "constitutional powers to make orders concerning the capture, detention, and interrogation of enemy prisoners, irrespective of any arguably inconsistent congressional enactment." Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Ga. L. Rev. 807, 830 (2006) ("Paulsen Article"); *see also, e.g.*, Flanigan Decl. ¶ 6. Even more recently, in testimony submitted to the Senate Judiciary Committee, Paulsen stated that the Commander-in-Chief discussion is "*unquestionably correct.*" Michael Stokes Paulsen, *The Lawfulness of the Interrogation Memos* at 4 (May 13, 2009) (written testimony before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary) ("Paulsen Testimony") (Appendix 6) (emphasis in original).[94] He also stressed that the "quality of the analysis ... is clearly well within professional standards"—"[t]his is not even a close question." Paulsen Testimony at 6.

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[90] OPR has no answer to *In re Stanton*, instead nakedly asserting that it "reject[s]" this constraint. Report at 14 n.14. Whatever authority OPR has to address "allegations of misconduct involving Department attorneys that relate to the exercise of their authority to ... provide legal advice," binding DOJ regulations prohibit OPR from holding attorneys to a higher standard than the applicable state or local bar (here, D.C.) rules of professional conduct. *See supra* Section III. OPR simply cannot impose its own preferred legal and policy judgments. *Id.*; *infra* Section VI.D.

[91] Contrary to OPR's contention, OLC never assumed "that enforcing the statutory prohibition against torture *would* interfere with the interrogation of prisoners during wartime." Report at 201. OLC merely held that, insofar as the President determined a particular interrogation was necessary to the discharge of his Commander-in-Chief duties (e.g., a need to obtain information to avert an imminent catastrophic threat to the nation), the anti-torture statute must yield to the constitution.

[92] Naturally, then, "the word 'torture' does not appear" in OLC's Commander-in-Chief discussion. Report at 201. OPR's confusion on this point is yet another example of the ideological preconceptions that pervade OPR's Report. *See supra* Section IV.E.

[93] Professor Hazard stated, "[Paulsen] has worked through the field of Executive Authority more thoroughly than any other scholar of whom I am aware." Hazard Letter ¶ 8.

The Bybee Memo ultimately concludes that the statute could not constitutionally be applied to the President's interrogation of terrorists overseas insofar as it was an integral and necessary component of the ongoing war effort, pursuant to his Commander-in-Chief authority. OLC prefaces its analysis with a discussion of the September 11 attacks and the resulting "effort at home and abroad to counter terrorism," to which Congress lent its support. Bybee Memo at 32. Indeed, Congress recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." S.J.Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see* Bybee Memo at 32.

The Bybee Memo first explains that, in keeping with past OLC opinions and judicial precedent, in order to avoid constitutional difficulties, a statute of general applicability should not be interpreted to reach the conduct of the President, unless the statute specifically so provides. Bybee Memo at 33-35, *citing, inter alia, Olson 1984 Opinion*, 8 Op. O.L.C. at 134; *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that *textual silence is not enough* to subject the President to the provisions of the [Administrative Procedure Act]. We would require an *express* statement by Congress[.]"). Thus, as the anti-torture statute nowhere specifically applied to the President, OLC concludes it should not be read to reach his power to successfully prosecute the war and protect the nation from further attacks. *Id.* The Bybee Memo then concludes that, insofar as the statute is read to inhibit the President's ability to order an interrogation pursuant to his Commander-in-Chief authority, it would be unconstitutional.

In reaching these conclusions, the Bybee Memo explains that there are certain "core" Article II powers that Congress cannot impinge upon, including those powers necessary for the President to successfully prosecute a conflict. *Id.* at 38. The Bybee Memo reasons that, where the President believes a "battlefield combatant" has actionable intelligence necessary to successfully defend the country from attack, it is squarely within his Commander-in-Chief duties to obtain that information. As the memo points out, in the modern struggle with terrorist organizations, as opposed to traditional nation states, there is a heightened role for intelligence gathering, which might be the only means to thwart "covert terrorist attacks upon the United States." *Id.* at 39. Accordingly, the Bybee Memo explains, interrogations necessary to preventing such attacks are thus part and parcel of the President's "strategic and tactical decisions on the battlefield." *Id.* The Bybee Memo's Commander-in-Chief conclusion is reasonable when considered against the backdrop of other widely-accepted opinions.

The prevailing view is that there is *some* measure of core Commander-in-Chief and Article II war-making authority that the President can invoke to protect the country and that Congress cannot encroach upon. The Supreme Court, for example, recently stated that Congress cannot "'intrude ... upon the proper authority of the President'" and "'cannot direct the conduct of campaigns.'" *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring)); *see also Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them ***in the manner he may deem most effectual*** to harass and conquer and subdue the enemy."). Similarly, Walter Dellinger, Assistant Attorney General of OLC under President Clinton, has explained that "there can be ***no room to doubt*** that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces." *Placing of United States Armed Forces Under United Nations Operations or Tactical Control*, 20 Op. O.L.C. 182, 1996 WL 942457, at *2 (May 8, 1996) ("*Dellinger 1996 Opinion*") (citing *Fleming*, 50 U.S. at 615).[95]

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[94] *Cf.* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1258 (2004) (explaining that "the Constitution either creates or recognizes a constitutional law of necessity, and appears to charge the President with the primary duty of applying it and judging the degree of necessity in the press of circumstances").

Current OLC attorneys Acting Assistant Attorney General David Barron and Deputy Assistant Attorney General Martin Lederman recently acknowledged that "[t]here is a venerable scholarly consensus that Congress is constitutionally disabled from using its Article I war powers to limit the President's 'tactical' options in wartime [or] to 'interfere[] with the command of the forces and the conduct of campaigns.'" David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 945 (2008) (quoting *Milligan*, 71 U.S. at 139 (Chase, C.J., concurring)); *see also id.* at 1025 & n.334 (collecting commentary describing the majority view). As they further explained, "the Bush Administration's striking assertions of preclusive powers are ultimately predicated on a *basic proposition that even its critics have generally taken for granted.*" *Id.* at 945; *see generally* David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 691 (2008).

Once we recognize that there is a core Commander-in-Chief power, the only question is how far it extends. At the time the memos were written that was an open question, and many believe it remains so today. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-17 (2004) (plurality) ("We do not reach the question whether Article II provides such [plenary detention] authority ...."); *id.* at 587 (Thomas, J., dissenting) ("[W]e need not decide that question because Congress has authorized the President."); *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting from denial of certiorari) (arguing that the Court should address the extent of executive authority to detain indefinitely).[96] As then-Judge Mukasey remarked, around the time the memos were written: "[I]t would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. *There isn't.*" *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002) (Mukasey, C.J.), *rev'd*, 352 F.3d 695 (2d Cir. 2003) (2-1 decision), *rev'd*, 542 U.S. 426 (2004) (5-4 decision).

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[95] *See also, e.g.*, Barack Obama, The White House, *Signing Statement on Omnibus Appropriations Act, 2009* (Mar. 11, 2009) (arguing statutory provisions impinge on Commander-in-Chief authority); *The Nomination of Eric Holder to be Attorney General in the Obama Administration: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 28 (Jan. 15, 2009) (President's authority can sometimes override Congress); *Nomination of David Ogden to be Deputy Attorney General: Response to Written Questions for David Ogden from Senator Specter*, 111st Cong. 3 (2009) (same); Flanigan Decl. ¶ 6 ("[M]ost who have lead [OLC] would agree ... the President's powers are particularly strong in certain aspects of his role as Commander-in-Chief and the area of foreign affairs."); Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. L.J. 1213, 1239 (2005) (noting that the "conventional academic view holds that to some extent these powers are beyond the power of Congress to restrict"); William Howard Taft, *The Boundaries Between the Executive, the Legislature, and the Judicial Branches of the Government*, 25 Yale L.J. 599, 610 (1916) ("When we come to the power of the President as Commander-in-Chief it seems perfectly clear that Congress could not order battles be fought on a certain plan, and could not direct parts of the army to be moved from part of the country to another.").

Nearly all agree that the Commander-in-Chief power must extend (to the exclusion of congressional power) at least to tactical commands on the battlefield and the conduct of campaigns. *See, e.g., Hamdan*, 548 U.S. at 592; *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring) (Congressional power extends to warmaking "except such as interferes with the command of the forces and conduct of campaigns," which "power and duty belong[s] to the President as commander-in-chief"); Memorandum from William Rehnquist, Assistant Attorney General, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 21 (May 22, 1970). As one scholar explains this "robust core of exclusivity," "[o]nly the President can direct troop movements, form military strategies, order a battlefield attack, and so on." David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. Rev. 1791, 1855 (1998); *see also* Barron & Lederman, 121 Harv. L. Rev. at 750-51 & n.191 (explaining that "most war powers scholars" have "embraced some variant" of this preclusive core) (citing John Hart Ely and several others). Further, many accept that the battlefield can extend to U.S. territory. *See, e.g., The Nomination of Elena Kagan: Hearing Before S. Comm. on the Judiciary*, 111th Cong. (2009).[97] Still others see the constitutional authority as extending even beyond the battlefield proper. *See Bancoult v. McNamara*, 445 F.3d 427, 437 n.5 (D.C. Cir. 2006) ("While the current case does not involve battlefield decisions, the tactical and logistical details of establishing an overseas base are as much a matter of executive discretion [as Commander-in-Chief] as are strategic decisions."). The authority, it is understood, must be sufficient in a given context to "'protect the security and effectuate the defense of the United States'" and thus includes "'such supreme and undivided command as would be necessary to the prosecution of a successful war.'" *Shiffrin 1995 Opinion* at 1 (quoting *United States v. Sweeny*, 157 U.S. 281, 284 (1895); *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61-62 (1941) (Jackson, AG) ("*British Flying Students*")).[98]

Significantly, most also agree that it also includes some measure of intelligence gathering. *See, e.g.*, *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intell. Surveil. Ct. Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information .... We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.").[99] For example, subsequent to the Bybee Memos, an OLC White Paper espoused a broad view of Article II authority to collect foreign intelligence information using warrantless wiretaps, notwithstanding any statutory strictures. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 2006 WL 6179901, at *3 (O.L.C. Jan. 19, 2006) (Statutes would be unconstitutional if they "impede the President's ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States ...."). Similarly, it is well-established that the President is charged with intelligence protection. As the Obama administration recently argued, "[t]he [state secrets] privilege has a firm foundation in the constitutional authority of the President under Article II to protect national security information." Motion to Dismiss at 12 n.9, *Jewel v. NSA*, No. 08-cv-4373 (N.D. Cal. Apr. 3, 2009) (citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988), and *United States v. Nixon*, 418 U.S. 683, 710-11 (1974)) (recognizing the President's constitutional authority to protect national security information).

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[96] *But see Hamdan*, 548 U.S. at 593 n.23 (apparently rejecting the argument that Article II permits military commissions in the face of congressional enactment); *Hamdi*, 542 U.S. at 568-69 (Scalia, J., dissenting) (rejecting the argument that Article II permits indefinite wartime detention of citizens).

[97] *See also, e.g.*, Letter to Salmon P. Chase from Lincoln (Sept. 2, 1863) *in Lincoln: Speeches And Writings 1859-1865* 501 (Library of America 1989) ("The original [emancipation] proclamation has no constitutional or legal justification, except as a military measure.").

[98] *See also, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) ("The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying those powers into execution.") (citation omitted); *Request of the Senate for an Opinion as to the Powers of the President In Emergency or State of War*, 39 Op. Att'y Gen. 343, 347-48 (1939) ("It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers [cannot be] specifically defined [because] their extent and limitations are largely dependent upon conditions and circumstances. ... The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.").

In short, in light of the uncontroversial view that the President has at least *some* measure of inherent, inviolable authority, the only question remaining is whether an interrogation of a suspected terrorist believed to have knowledge of imminent catastrophic attacks could be within the Commander-in-Chief's power. *See* Paulsen Article at 813 ("[T]here is legitimate room for disagreement as to its full scope, and fair-minded men and women can dispute the executive branch's assertions as to its understanding of that scope and its relationship to other legislative powers."). As shown above, the President must be able both to direct his forces in combating the enemy and to collect foreign intelligence. It is not unreasonable to conclude that a statute that purported to regulate the President's authority to obtain intelligence in connection with the nation's immediate defense violates Article II. This is a reasonable reading of the Constitution, on a question that no court has squarely confronted, and OPR cannot (and does not) seriously contend otherwise.

More generally, OPR's criticism that OLC has not taken a "widely-held" or "majority" view is, as a matter of professional misconduct, irrelevant in light of past executive branch practice. Executive branch attorneys (OLC and the AG) have long taken a robust view of Executive Authority, without regard to whether it was the majority view. The Clinton administration, for example, was "excoriated" for its "'absolutist pretensions' in military affairs" and "Clinton's OLC wrote several opinions arguing that the President could disregard congressional statutes that impinged on the Commander in Chief or related presidential powers." Goldsmith, *The Terror Presidency* at 36. Numerous administrations have either explicitly or implicitly found the War Powers Resolution ("WPR") unconstitutional and ignored it. In fact, as of early 2009, "every President has taken the position" that the WPR—which purports to place conditions on the President's ability to send troops into combat—"is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief." Richard F. Grimmett, Congressional Research Service, Library of Congress, *War Powers Resolution: Presidential Compliance* 1 (2009); *see also Overview of the War Powers Resolution*, 8 Op. O.L.C. 271, 281-83 (Oct. 30, 1984) (Olson) (instances of Presidents Nixon, Ford, Carter and Reagan moving troops into actual or imminent hostilities without complying with WPR). Consistent with this trend, President Obama continues to issue signing statements, jealously guarding his Article II powers against legislative encroachment,[100] even though it "riles Congress." Charlie Savage, *Obama's Embrace of a Bush Tactic Riles Congress*, *N.Y. Times*, Aug. 8, 2009.

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[99] *See also El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007) ("'Gathering intelligence information and the other activities of the [CIA], including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces.'") (citation omitted); *Warrantless Foreign Intelligence Surveillance – Use of Television – Beepers*, 2 Op. O.L.C. 14, 15 (1978) (The President has the "constitutional power to gather foreign intelligence."); *Presidential Discretion to Delay Making Determinations Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991*, 19 Op. O.L.C. 306 (Nov. 16, 1995) ("As a constitutional matter, the President, as Commander in Chief, has the inherent authority to employ sources for gathering intelligence needed to protect the national security of the United States."); *Amending the Foreign Intelligence Surveillance Act: Hearings Before the H. Permanent Select Comm. on Intelligence*, 103d Cong. 61 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("[T]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes ...."); *but see ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

Especially where national security and international relations are at play, there is a well-established history of the Department flexibly interpreting statutes to avoid conflict with President's Article II powers, or of outright asserting Article II authority to justify actions otherwise contrary to statutes. For example, analyzing a bill that "seeks to compel the President to build and to open a United States Embassy to Israel at a site of extraordinary international concern and sensitivity," OLC opined that "Congress cannot constitutionally constrain the President in such a manner." *Bill to Relocate United States Embassy From Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 1995 WL 1767996, at *3 (May 16, 1995) (Dellinger). Along the same lines, OLC declared unconstitutional bills proposing to limit the President's ability to place United States armed forces under the UN operational or tactical control. *Dellinger 1996 Opinion*; *Shiffrin 1995 Opinion*; *see also Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462 (O.L.C. Nov. 28, 2001) (provision restricting funds for use of troops in UN peacekeeping missions is unconstitutional). As to intelligence gathering in particular, OLC has explained that "'the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch.'" *Access to Classified Information*, 20 Op. O.L.C. 402 (Nov. 26, 1996) (quoting Brief for the Appellees at 42, *Am. Foreign Serv. Ass'n v. Garfinkel*, 488 U.S. 923 (1988) (No. 87-2127)).[101] OLC has similarly advanced the President's Article II authority in other contexts,[102] including asserting that criminal statutes of general applicability do not apply to the executive unless they specifically so state.[103]

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[100] *See, e.g.*, Barack Obama, White House, *Signing Statement for H.R. 1105, the "Omnibus Appropriations Act, 2009"* (P.L. 111-8) (Mar. 11, 2009) (arguing statutory provisions impinge on Commander-in-Chief authority); see also Barack Obama, White House, *Signing Statements for H.R. 2346, the "Supplemental Appropriations Act, 2009"* (P.L. 111-32) (June 26, 2009) (stating President's intent to ignore provisions that "would interfere with [his] constitutional authority to conduct foreign relations"); Barack Obama, White House, *Signing Statement for H.R. 131, an act establishing the Ronald Reagan Centennial Commission* (P.L. 111-25) (June 2, 2009) (asserting separation of powers and Appointments Clause authority); Barack Obama, White House, *Signing Statement for S. 386, the "Fraud Enforcement and Recovery Act of 2009"* (P.L. 111-21) (May 20, 2009) (construing provisions so as "not to abrogate any constitutional privilege"); *see also* Charlie Savage, *Obama's Embrace of a Bush Tactic Riles Congress*, *N.Y. Times*, Aug. 8, 2009 ("President Obama has issued signing statements claiming the authority to bypass dozens of provisions of bills enacted into law since he took office ....").

And when the Congress encroaches on the President's authority, it is not only his right but his "enhanced *responsibility* to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 201 (Dellinger). In particular, if the President believes that an enactment unconstitutionally limits his powers, "he has the authority to defend his office and decline to abide by it, unless he is *convinced* that the [Supreme] Court would disagree with his assessment." *Id.* OPR has not examined *any* of these executive branch precedents or practices. *Cf.* Report at 202 (charging OLC with not providing a "thorough discussion").

This discussion demonstrates that even if the memos represent a step beyond[104] anything OLC has been presented with previously, OLC's defense of the President's powers is consistent with the principles on which these discussions were based. It is wholly appropriate for OLC to jealously guard executive authority from encroachment by the other branches, and to independently arrive at those positions. Judge Bybee has confirmed that it was his

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[101] *See also, e.g.*, *Whether the President May Have Access to Grand Jury Material In the Course of Exercising His Discretion to Grant Pardons*, 2000 WL 34474450 (O.L.C. Dec. 22, 2000) (reading Fed. Draft Report Crim. P. 6(e) to avoid impinging on Article II authority); Memorandum for the Counsel Office of Intelligence Policy and Review, *Sharing Title III Electronic Surveillance Material With the Intelligence Community* (Oct. 17, 2000) (interpolating exception in deference to presidential powers); *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (May 20, 1998) (Moss written testimony before House committee) (The bill "is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress"); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37 (Feb. 16, 1990) (bill impinges on President's "broad" Article II authority over nation's diplomatic affairs, "flow[ing] from his position as head of the unitary Executive and as Commander in Chief").

[102] *See, e.g.*, *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 O.L.C. 350 (Dec. 18, 1995) (reading statute not to apply to presidential appointment of judges); *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 361 (Sept. 28, 1989) (construing Anti-Lobbying Act not to apply fully to president so as not to interfere with Recommendations Clause power); *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (Feb. 22, 1984) (legislation requiring an Executive Branch officer to submit budget proposals and bill comments directly to Congress would be an "unconstitutional intrusion by the Legislative Branch into the President's exclusive domain"); *Judges—Appointment—Age Factor*, 3 Op. O.L.C. 388, 389 (Oct. 3, 1979) (President not subject to Age Discrimination in Employment Act in selecting judges); *see also Constitutionality of Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 2008 WL 4753234 (O.L.C. Jan. 29, 2008) (surveying past decisions reading reporting statutes to avoid constitutional problems).

[103] *Olson 1984 Opinion*, 8 Op. O.L.C. at 127 (interpreting criminal contempt statute not to apply to President and subordinates asserting executive privilege lest it impinge on Executive authority).

[104] In fact, going a "step beyond" prior decisions is exactly how Constitutional interpretation and the common law operate—even while maintaining the benign fiction of continuity in the law.

"responsibility as head of the office of legal counsel ... to be a vigorous defender of the president's prerogative." Bybee Tr. at 54. OLC's views are reasonable, persuasive, and in no way reckless. *See Safeco*, 551 U.S. at 70 n.20 (it would "defy history and current thinking" to find a legal interpretation to be reckless where the text and relevant precedent "allow for more than one reasonable interpretation."); *see also* Posner & Vermeule (OLC's analysis "falls well within the bounds of professionally respectable argument"); John Hagan, Gabrielle Ferrales & Guillermina Jasso, *How Law Rules: Torture, Terror, and the Normative Judgments*, 42 Law & Soc'y Rev. 605, 610 (2008) (acknowledging the view that, although most would disagree, "a number of well-recognized scholars such as Posner (2004), Ignatieff (2005), and Dershowitz (2002) have argued that there is merit in the reasoning" of the Commander-in-Chief discussion).

The arguments do not suddenly become less reasonable—let alone unethical—if successor attorneys decline to adopt the analysis as unnecessary, *see* Levin Memo at 2 ("Because the discussion in [the Bybee Memo] concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows."), or even eventually withdraw them, *see* Bradbury 2009 Memo at 3 (withdrawing particular statements regarding Commander-in-Chief discussion).[105] Although OPR cites Goldsmith, Bradbury, and Levin as taking issue with the Commander-in-Chief analysis, *see, e.g.*, Report at 124, 196-99, 203-04, mere disagreement is not evidence of ethical failings. This no more proves professional misconduct than does Attorney General Holder's recent abrupt and unceremonious reversal of an OLC opinion on another significant constitutional issue that cuts to the heart of our structure of government. *See* Carrie Johnson, *A Split at Justice on D.C. Vote Bill: Holder Overrode Ruling that Measure is Unconstitutional*, Wash. Post, Apr. 1, 2009, at A1.[106] Disagreements among attorneys on difficult questions are the foundation of the legal profession—not the stuff of ethics complains.

Indeed, Goldsmith has emphatically stated: "I am confident, based on what I know, that Jay Bybee acted in good faith (i.e. did not think he was violated the law) and satisfied his professional responsibilities." Goldsmith Submission at 4 n.7. Also, Bradbury specifically noted that his memo was not "intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility." *Id.* at 1 n.1.[107] And Levin stated that his disagreements with the Bybee Memo were never "intended to suggest that [he] believed the authors had committed professional misconduct." Levin Decl. ¶ 6.

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[105] Moreover, the administration had otherwise continued to espouse a broad view of executive power even after withdrawing certain opinions. *See, e.g.*, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 2006 WL 6179901, at *3; George Bush, The White House, *Signing Statement on the Detainee Treatment Act*, H.R. 2863 (Dec. 30, 2005). Tellingly, Bradbury withdrew only "specific assertions" in prior memos, but nonetheless stressed that the President has "broad authority as Commander in Chief to take military actions in defense of the country," such as "deploy[ing] military and intelligence capabilities," and has "no doubt" that "necessarily includes authority to effectuate the capture, detention, interrogation, and, where appropriate, trial of enemy forces, as well as their transfer to other nations." Bradbury 2009 Memo at 4.

[106] OLC has reversed its prior opinions on several occasions. *See, e.g.*, Memorandum Op. for the Deputy Attorney General from Theodore B. Olson, *War Powers Resolution: Detailing of Military Personnel to the CIA* (Oct. 26, 1983) (reversing OLC's prior conclusion that the War Powers Resolution did not apply to CIA military personnel). In fact, Justice Jackson once repudiated his own prior opinion (as Attorney General), acknowledging that the opinion's "lack of precision with generalities ... gave off overtones of assurance" that might have "misled" some readers. *McGrath v. Kristensen*, 340 U.S. 162, 176-77 (1950) (Jackson, J., concurring) (addressing *Registration of Aliens Under Selective Training and Service Act*, 39 Op. Att'y Gen. 504, 505 (Oct. 11, 1940)). He also pointed out that it is hardly uncommon for jurists to reverse themselves. *See id.* at 178 (quoting Lord Westbury, who stated, "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion."); *id.* at 177-78 (citing *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847) (Chief Justice Taney, recanting his prior views as Attorney General of Maryland); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 478 (1827) (Story, J.) (noting that his "own [prior] error ... can furnish no ground for its being adopted by this Court")).

4. The Bybee Memo Relied on Prior OLC Opinions and Reasonably Declined to Reiterate Unnecessary Discussions

The bulk of OPR's specific criticisms revolve around OPR's view that OLC simply did not say *enough* to justify its conclusions. OPR is wrong on the facts and the law. OPR first refuses to acknowledge that, as this opinion was merely the latest in an ongoing dialogue between sophisticated executive branch attorneys, OLC need not (and, as a practical matter, *could not*) rehash its entire jurisprudence. Instead, OPR severs the Bybee Memo from the underlying body of case law upon which OLC explicitly relies and incorporates. OPR then quibbles with OLC's professional judgment on whether to include unnecessary background information in order to keep the opinion to a manageable length and to ensure that it is completed by the hard deadline OLC was given. Even so, OPR nowhere asserts that adopting its proposed edits would necessarily change OLC's conclusion or that OLC's conclusions are an unreasonable constitutional interpretation. We first address OPR's failure to appreciate the background jurisprudence and the target audience of the Bybee Memo. We then turn to OPR's specific arguments that OLC failed to discuss *Youngstown*, Congress's enumerated powers, or the Take Care Clause—none of which support its conclusion as to the thoroughness, objectivity, and candor of OLC's legal advice.

a. The Bybee Memo appropriately incorporated prior decisions and tailored its advice to its intended audience

OPR looks at the Bybee memo in isolation, severing it from the jurisprudential backdrop against which it was written. OPR also discounts the fact that the recipients of the Bybee Memo consisted of sophisticated executive branch attorneys who did not need a primer on the separation of powers. But it is incoherent to find OLC did not say enough without factoring in everything OLC did say as well as the intended audience.

All of the OLC memos—including the ones at issue here—were part of an ongoing dialogue, a fact the memo explicitly highlighted: "In a series of opinions examining various legal questions arising after September 11, we have explained the scope of the President's Commander-in-Chief power. We ***briefly summarize*** the findings of those opinions here." Bybee Memo at 36 (citing examples); *see also* Gonzales Press Conference June 2004 (stating that this was a conversation that was ongoing and the public walked into the middle of the conversation); Bybee Tr. at 87. OLC thus candidly—indeed, transparently—disclosed that it was providing a *summary*, as opposed to an exhaustive rendition, of the constitutional issues at stake.

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[107] Unlike in its Draft Report, OPR now belatedly concedes, as it must, that these officials believe Judge Bybee did not engage in unethical conduct. *See, e.g.*, Report at 29 n.29 (Bradbury), 197 n.151 (Goldsmith).

The first known memo in that dialogue came just two weeks after September 11th. *See* Memorandum Opinion for the Deputy White House Counsel from John Yoo, Deputy Assistant Attorney General, OLC, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) ("*Military Operations Opinion*") (cited in Bybee Memo at 36). In that memo, OLC acknowledges, for example, the general relevance of Justice Jackson's *Youngstown* concurrence and acknowledged that "the Framers unbundled some plenary powers that had traditionally been regarded as 'executive,' assigning elements of those powers to Congress in Article I." *Id.* Other opinions, such as the *Military Commissions Opinion,*[108] the *Transfer Opinion,*[109] and the *Swift Justice Opinion,*[110] discuss whether Congress's enumerated powers impact the Commander-in-Chief power. These opinions, and numerous others, are all part of the continuing post-9/11 conversation and are all incorporated by reference into the Bybee Memo's Commander-in-Chief analysis. *See, e.g.*, Bybee Memo at 32, 35, 38.

To force OLC to reiterate basic constitutional law principles, to exhaustively detail every possible argument and counter-argument, and to reiterate and reanalyze all analysis in past memos, would result in unworkably long opinions, with no value added for the client. The idea that these highly-skilled executive branch attorneys—who had already received numerous prior OLC opinions on the topic—would not know about *Youngstown*, Congress's enumerated powers, and the Take Care clause is preposterous, as discussed further below. It is no answer to point out, as OPR does, that Goldsmith thought the Commander-in-Chief section was flawed. Report at 205 (deciding, based on Goldsmith criticisms, to "reject Bybee's assertion that the memorandum ... was sufficient for the audience for which it was intended"). Although Goldsmith might disagree with some of the judgments OLC made (including the decision not to cite *Youngstown*), that does not mean that the "audience for which it was intended" (i.e., those officials with whom OLC had been conducting an ongoing dialogue, prior to Goldsmith's arrival) actually felt the same way. In any event, OLC made the reasonable judgment that reviewing such matters would add nothing, except length, to the discussion.

b. The decision not to reiterate *Youngstown* is appropriate

OPR uses OLC's failure to cite *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), as support for its professional misconduct findings. Report at 204 ("[A] thorough, objective, and candid discussion would have acknowledged its relevance to the debate."); *id.* at 205. Describing *Youngstown* as "the leading Supreme Court case on the distribution of governmental powers between the executive and the legislative branches," OPR appears particularly concerned about the omission of Justice Jackson's concurring opinion. *Id.* at 204;

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[108] Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

[109] Memorandum for William J. Haynes, II, General Counsel, Department of Defense from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander-in-Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* at 5-7 (Mar. 13, 2002).

[110] Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Swift Justice Authorization Act* 10 (Apr. 8, 2002).

see id. at 117-20, 205. As an argument about thoroughness, objectivity, and candor, this contention lacks merit. Although *Youngstown* (in particular Justice Jackson's concurrence) can provide a useful framework, it is moot once it is determined (as OLC did) that a given action falls within the core executive power. OPR utterly ignores the scores of judicial and OLC opinions (under both political parties) that, like the Bybee Memo, make no explicit mention of this supposedly-indispensable framework. *See* Appendix 17.

In *Youngstown*, the Supreme Court held that President Truman was not constitutionally empowered to seize domestic steel mills, in derogation of congressional enactments, even with the purpose of averting a strike in service of the war effort. 343 U.S. at 586-89. The President, the Court explained, does not have "the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." *Id.* at 587. In the oft-cited concurrence by Justice Jackson, he pointed out that, in ascertaining the President's authority to take a given action, there are three possible scenarios: Congress has approved that action, Congress has remained silent on such action, or Congress has purported to forbid such action. *Id.* at 635-38. In the first, the President can depend on all of his own power, plus all that Congress can add; in the second, the President can act on his own authority in the "zone of twilight" where Congress might have concurrent authority; and, in the third, the President can only act if the authority is within the core, exclusive executive authority. *Id.* at 637. In the third category, although congressional action leaves Presidential power "most vulnerable to attack and in the least favorable of possible constitutional postures," the President may act when it "is within his domain and *beyond control by Congress*." *Id.* at 640.

Justice Jackson's *Youngstown* concurrence lays out a tripartite analytical framework for assessing Executive power that is commonly used as a pedagogical tool. In the Supreme Court, however, that tripartite framework is more often ignored than followed. In *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981), the Court, for the first time, used Jackson's tripartite formula for analyzing the case, although it altered the formulation. *See also Hamdan*, 548 U.S. at 593 n.23 (citing the tripartite formula in a footnote, but altering it). Since *Dames & Moore*, the Court has occasionally used Jackson's formula, *e.g.*, *Medellin v. Texas*, 128 U.S. 1346, 1368 (2008), although more frequently, it has omitted it. For example, the Court simply failed to cite *Youngstown* at all in *Clinton v. New York*, 524 U.S. 417 (1998), and *Department of the Navy v. Egan*, 484 U.S. 518 (1988), and it has cited *Youngstown*—but without relying on Jackson's tripartite formula—in a host of other important separation of powers cases. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 386, 400, 408 (1989); *Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721-22 (1986); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1984). This is not to say that the Court's decisions were not consistent with, or even influenced, by Justice Jackson's tripartite formula. But in these cases, the Court did not recite the framework, and it did not cite *Youngstown* for that purpose.

Youngstown can be a useful framework—although it has not always had the status that OPR projects on it—but it is only a framework; it does not provide an answer to the question of the scope of executive power. Once the dispositive question that a given power is within the core of the President's Article II powers is affirmatively determined, then the framework is moot. Indeed, Judge Bybee stated during his interview with OPR that the memo implicitly contemplated falling under Jackson's third category. He explained to OPR that citing *Youngstown* would not have altered the ultimate analysis. *See* Bybee Tr. at 93 (stating that

Jackson's *Youngstown* concurrence is a "mode of analysis," that "it doesn't answer the question," and that the memo is "quite consistent" with Jackson's mode of analysis). And, the Bybee Memo cites a prior opinion, by Yoo, that recognizes *Youngstown*. Bybee Memo at 32 (citing *Military Operations Opinion*). Indeed, one commentator has noted that "*Youngstown* is consistent with both the academic theory of executive power and with the memoranda's view of its specific application to the war on terror. In fact, *Youngstown* seems affirmatively to support the memoranda's position at this point." Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. L.J. 1213, 1221, 1244 (2005) (arguing that a "more modest approach to presidential power" would have yielded similar results).[111]

It is therefore not surprising that the Attorney General and OLC have frequently seen fit to omit a discussion of *Youngstown*. In 1956, for example, just four years after *Youngstown* was issued, Acting Attorney General J. Lee Rankin advised the President, in a short written opinion, that in certain cases he may "depart from the statutory procedures and ... rely on constitutional authority to appoint key military personnel." *Promotion of Marine Officer*, 41 Op. Att'y Gen. 291, 294 (Aug. 22, 1956). He did not cite *Youngstown*. Later, in 1984, also without citing *Youngstown*, OLC concluded that a criminal contempt statute must not be interpreted to apply to the President and his subordinates asserting executive privilege, as it would otherwise violate "the separation of powers by stripping the Executive of its proper constitutional authority." *Olson 1984 Opinion*, 8 Op. O.L.C. at 127. And yet again, in 1989, OLC held, without citing *Youngstown*, that Congress may not require prior notice for covert CIA operations without "unconstitutionally infring[ing] on the President's constitutional responsibilities, including his duty to safeguard the lives and interests of Americans abroad." *The Constitutionality of the Proposed Limitation on the Use of the CIA Reserve for Contingencies*, 13 Op. O.L.C. 311 (July 31, 1989) (Barr).

More recently, in 1996, OLC nowhere cited *Youngstown* in concluding that legislation limiting the President's ability to place United States armed forces under the UN operational or tactical control "unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief." *Dellinger 1996 Opinion* at *2[112] Where the President determines that the purposes of a particular military operation require a particular action (there, placing troops under UN control), "Congress may not prevent the President from acting on such a military judgment." *Id.* Dellinger did, however, quote Jackson's earlier statement as Attorney General that "'the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States.'" *Id.* (quoting *British Flying Students*, 40 Op. Att'y Gen. at 61-62); *see also Shiffrin 1995 Opinion* at 1-2 (reaching the same conclusion in a perfunctory, two-page analysis without citing *Youngstown*).

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[111] In any event, *Youngstown* is distinguishable on its facts given that it involved fundamentally domestic economic activity—the seizure of steel plants—that the Court determined was insufficiently connected to the war effort to fall within the ambit of the President's core warmaking authority. Indeed, Justice Jackson found President Truman's actions to be outside of the core Presidential powers because the "military powers of the Commander in Chief were not to supersede representative government of *internal affairs*." 343 U.S. at 644; *see id.* at 642 (explaining that endorsing Truman's view would "vastly enlarge his mastery over the internal affairs of the country"). On the other hand, Justice Jackson stressed that he would "indulge the widest latitude of interpretation to sustain his executive function to command the instruments of national force" when "turned against the *outside world* for the security of our society." *Id.* at 645. Here, of course, we are dealing with the wartime interrogation of declared enemy combatants held outside of the U.S. proper, and the torture statute itself *only* applies outside the United States. 18 U.S.C. § 2340. *See also The Constitutionality of the Proposed Limitation on the Use of the CIA Reserve for Contingencies*, 13 Op. O.L.C. 311 (July 31, 1989) (holding, without citing *Youngstown*, that Congress cannot require the President to disclose covert CIA operations, and noting the "'essential'" difference between "'external affairs'" and "'internal affairs'" (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))).

[112] *See also* Barron & Lederman, *A Constitutional History*, 121 Harv. L. Rev. at 1091 ("[T]he [Dellinger] opinion did not cite, let alone discuss, *Youngstown*.").

These are but a few examples. There are numerous other instances where OLC has concluded that a legislative measure is unconstitutional (or where it does the functional equivalent and "interprets" a blanket statute so as not to intrude upon executive authority) without addressing *Youngstown*. *See, e.g.*, *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253 (June 28, 1996) (Dellinger) (concluding that interpreting statute to allow Congress to "compel the President to disclose the contents of international negotiations of a highly sensitive and confidential nature" would be "an invalid intrusion into the President's [Commander-in-Chief and other] constitutional authority") (not citing *Youngstown*).[113]

There are also a number of opinions (including one by Philbin) that, while citing other passages of *Youngstown* that focus on and *support* strong executive power, do not apply the popular Jackson concurrence. *See, e.g.*, *Swift Justice Opinion* at 4 (citing *Youngstown* only for Justice Frankfurter's assertion that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress but never before questioned ... may be treated as a gloss on 'Executive Power' vested in the President").[114] In fact, the current OLC, in an opinion signed by Acting Assistant Attorney General David Barron, nowhere cited Justice Jackson's tripartite scheme in concluding that a provision prohibiting the State Department from using funds for sending a delegation to a U.N. body chaired by a terrorist-supporting government "unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy, and the State Department may disregard it." Memorandum Opinion for the Acting Legal Adviser, Department of State, from David S. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, at 1 (June 1, 2009) ("*Barron 2009 Opinion*"). OLC only indirectly referenced one of the *other Youngstown* concurrences to bolster its holding that the President's authority is exclusive in this area. *See id.* at 5 n.6 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003), in turn citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). That this opinion was issued notwithstanding the public criticisms leveled against the Bybee Memo, suggests that, even now, OLC *still* does not afford *Youngstown* in general (or Justice Jackson's concurrence in particular) the exalted status that OPR and some other commentators attach.[115] Notably, OPR has not addressed a single one of these OLC precedents—past or present—even though Judge Bybee brought such examples to OPR's attention in his Draft Response (at 66-67 & n.41). Such willful blindness again highlights the one-sided nature of OPR's report.

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[113] *See also, e.g.*, *Whether the President May Have Access to Grand Jury Material In the Course of Exercising His Discretion to Grant Pardons*, 2000 WL 34474450, at *1, 6 (O.L.C. Dec. 22, 2000) (reading Fed. R. Crim. P. 6(e) to avoid impinging on Article II authority) (not citing *Youngstown*); Memorandum for the Counsel Office of Intelligence Policy and Review, *Re: Sharing Title III Electronic Surveillance Material With the Intelligence Community*, at 9 (Oct. 17, 2000) ("Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be 'subject to an implied exception in deference to such presidential powers.'") (quoting *Rainbow Navigation, Inc. v. Dep't of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.), and not citing *Youngstown*); *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 1998 WL 1180178, at *1 (May 20, 1998) (Moss written testimony before House committee) (The bill "is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress.") (not citing *Youngstown*); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (Dec. 18, 1995) ("well-settled principle that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives") (not citing *Youngstown*, but citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37 (Feb. 16, 1990) (bill impinges on President's "broad" Article II authority over nation's diplomatic affairs, "flow[ing] from his position as head of the unitary Executive and as Commander in Chief") (not citing *Youngstown*, instead citing *Haig v. Agee*, 453 U.S. 280, 291-92 (1981), and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936)); Memorandum from Will P. Barr, Assistant Attorney General, to General Counsel's Consultative Group, *Common Legislative Encroachments on Executive Branch Authority* (July 27, 1989) (providing "an overview of the ways Congress most often intrudes or attempts to intrude into the functions and responsibilities assigned by the Constitution to the executive branch") (not citing *Youngstown*) (superseded); Memorandum Opinion for Attorney General from John M. Harmon, *Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731 (Aug. 13, 1980) (Harmon) (proposed legislative veto "intrudes upon the constitutional prerogatives of the Executive") (not citing *Youngstown*); *Inspector General Legislation*, 1 Op. O.L.C. 16 (Feb. 21, 1977) (Harmon) (holding that inspector general bill unconstitutionally impinges on executive power) (not citing *Youngstown*); *see also Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462, at *1 (Nov. 28, 2001) ("A provision prohibiting the use of appropriated funds for United Nations peacekeeping missions involving the use of United States Armed Forces under the command of a foreign national unconstitutionally constrains the President's authority as Commander in Chief and his authority over foreign affairs.") (not citing *Youngstown*).

In sum, nothing can be made of OLC's omission of *Youngstown*. The case addressed the President's wartime control of the domestic steel industry. Justice Jackson's tripartite methodology can be a useful framework, but has never been widely received by the Supreme Court or OLC as the sole framework for analyzing separation of powers. Indeed, in numerous opinions *Youngstown* is nowhere to be found. In any event, the Bybee Memo, though not expressly referring to *Youngstown*, was consistent with its methodology and nothing would have changed even with a mechanical reference to *Youngstown*.

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[114] *See also, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 201 (Dellinger) ("Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment.") (citing *Youngstown* only for the proposition that President has "authority to act contrary to a statutory command"); Opinion of the Attorney General of the United States, Benjamin R. Civiletti, *Authority for the Continuance of Governmental Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 5-6 (Jan. 16, 1981) (concluding, without employing the Jackson framework, that statute "should not be read as necessarily precluding exercises of executive power"); Memorandum from William Rehnquist, Assistant Attorney General, Office of Legal Counsel, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 6-7 (May 22, 1970) (citing *Youngstown* concurrence only to quote Justice Jackson stating he would "'indulge the widest latitude of interpretation to sustain his exclusive function to command'").

[115] Curtis Bradley, a Duke University law professor and former State Department lawyer, "said [this] new memorandum demonstrated that the Bush legal team's approach was not as aberrational from other administrations as some critics contended." Charlie Savage, *Ignoring a Law on Foreign Relations*, N.Y. Times, Sept. 16, 2009, at A16.

c. The decision not to reiterate Congress's enumerated powers is appropriate

OPR also criticizes OLC for limiting its discussion of Congress's enumerated powers. Report at 202. According to OPR, the Bybee Memo "should have addressed the significance of the enumerated powers of Congress before concluding that the President's powers were exclusive." *Id.* This, too, provides no basis for professional sanctions.

Although Judge Bybee has readily conceded, in retrospect, that this particular section could have been more fulsome, *see* Bybee Tr. at 83, it does not come close to a reckless violation of any duty of thoroughness, objectivity and candor. In fact, the Bybee Memo *did* examine the relationship between Article I and Article II powers (Bybee Memo at 34-38), and concluded that the powers at issue here were not "expressly assigned in the Constitution to Congress" and thus were "vested in the President." *Id.* at 37. Also, more importantly, the memo expressly incorporates by reference prior OLC opinions that give a more detailed discussion,[116] explaining that OLC "has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of operations during a war." *Id.* at 35. OPR cannot seriously contend that relying on precedent—the stuff of any jurisprudential body—is grounds for professional sanctions.

For example, in stating that "[o]ne of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy," the Bybee Memo (at 38) expressly incorporates a prior opinion, the *Transfer Opinion*, in which OLC held that the President has the Commander-in-Chief power to transfer terrorists detained outside the U.S. to other countries. In that opinion OLC extensively examined the text, structure, and history (including historical practice) of Articles I and II, *see Transfer Opinion* at 2-20, and determined that the Commander-in-Chief power includes "all powers related to the conduct of war" less those that were "*[e]xpressly* carved out and delegated to Congress," *Transfer Opinion* at 5. Furthermore, OLC determined that Congress's powers to "'make Rules concerning Captures on Land and Water,'" U.S. Const. art. I, § 8, cl. 11 ("Captures Clause"), applied only to property, not persons. *Id.* Also, OLC found that Congress's power to "'raise and support Armies'" and to "'make Rules for the Government and Regulation of the land and naval Forces,'" U.S. Const. art. I, § 8, cls. 12 & 14 ("Armies Clause" and "Land and Naval Forces Clause"), is "limited to the discipline of U.S. troops, and not to issues such as the rules of engagement and *treatment concerning enemy combatants*." *Id.* at 5-6 (dicta). Significantly, OLC made clear that it was proceeding cautiously given the "novelty of the question" and the "lack of any direct guidance from the opinions of this Department or decision by the federal judiciary." *Id.* at 8. Ultimately, after explicitly considering arguments to the contrary,[117] OLC concluded that the executive retains the "the power to handle captured enemy soldiers" because the Constitution does not "specifically commit[] the power to Congress." *Id.* at 4-5. Having once labored to this conclusion, which equally applies in the context of the Bybee Memo, OLC is under no obligation to reinvent the wheel.

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[116] *See, e.g., Swift Justice Opinion* (Apr. 8, 2002) (cited in Bybee Memo at 35); *Transfer Opinion* at 5-7 (Mar. 13, 2002) (cited in Bybee Memo at 38); *Military Commissions Opinion* (Nov. 6, 2001) (cited in Bybee Memo at 36); *Shiffrin 1995 Opinion* (cited in Bybee Memo at 35); Memorandum from William Rehnquist, Assistant Attorney General, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 1-2 (May 22, 1970) ("Division of the War Power by the Framers of the Constitution") (cited in Bybee Memo at 37-38).

[117] OLC considers that "[i]t might be argued that" the Captures Clause addresses captured enemy soldiers and Congress's power to "raise and support Armies" (Armies Clause) or to "make Rules for the Government and

Similarly, in OLC's *Swift Justice Opinion*, Philbin reiterated that "any ambiguity in the allocation of a power that is executive in nature, such as the prosecution of war, must be resolved in favor of the Executive Branch." *Swift Justice Opinion* at 10 (cited in Bybee Memo at 35). Also, OLC reached several conclusions that are readily applicable to the lack of congressional power to detract from the Commander-in-Chief's authority in this area. *See id.* at 16-19. In particular, OLC held that there is "*no doubt* that Congress's power to 'make Rules concerning Captures on Land and Water' applies only to captured property," *id.* at 17 (relying in part on 3 Joseph Story, *Commentaries of the United States* § 1172, at 64 (reprinted 1991) (1833)); that the Define and Punish Clause (granting power to "define and punish ... Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10) was not "intended to confer a war-related power upon Congress at the expense of the President's power as Commander in Chief"; and that the Land and Naval Forces Clause "refers solely to rules for the regulation of the forces of the United States," *id.* at 19 n.12. *See also Military Commissions Opinion* at 5-6 (explaining that Congress can invoke the Armies Clause and Land and Naval Forces Clause "so long as any congressional regulations do not interfere with the President's authority as Commander in Chief").

Although the Report nowhere mentions the Philbin *Swift Justice Opinion*, the Report acknowledges that the *Transfer Opinion* had concluded that "'captures' were limited to the capture of property, not persons, and that Congress therefore had no authority to make rules concerning captures of persons." Report at 202 n.156. But then OPR simply proceeds on its own authority to take issue with this prior OLC legal judgment. *Id.* It is not OPR's role, even were it able to do so competently, to sit as some sort of Constitutional Court of Review over OLC's legal conclusions, past or present. *See Stanton*, 470 A.2d at 287. It is true that, just before the end of the last administration, OLC, in a memorandum from Bradbury, withdrew OLC's prior conclusion regarding the Captures Clause. Memorandum for the Files from Steven G. Bradbury, Principal Deputy Attorney General, Office of Legal Counsel, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, at 3 (Jan. 15, 2009). But, in 2002 and 2003, OLC was wholly justified in relying on what was then good law. It is also of no moment that the precedent was, as OPR dismissively notes, "an OLC opinion that [Bybee] himself signed five months earlier." Report at 202 n.156.

The point, which OPR still fails to grasp, is that OLC, like a court, has developed a body of case law and OLC no more has to justify (on pain of ethical sanctions) its reliance on prior (even recent) opinions than does the Supreme Court. It is not for OPR to decide that "the Bybee Memo's brief reference to the [*Transfer Opinion*] did not constitute an adequate consideration of the relevance of the Captures Clause." *Id.* n.156. OLC cited the *Transfer Opinion* for the proposition that "[o]ne of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy." Bybee Memo at 38. The *Transfer Opinion* had already determined that the Captures Clause *was not relevant* in this context and, under

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Regulations of the land and naval Forces" (Land and Naval Forces Clause) "might also be thought to confer on Congress the power to promulgate prisoner of war policy." *Transfer Opinion* at 5.

familiar principles of *stare decisis*, the matter was, at that time, settled. As Goldsmith has acknowledged, there is a "superstrong stare decisis presumption" because "[c]onstant reevaluation of prior OLC decisions" would be unworkable. Goldsmith, *The Terror Presidency* at 146. Indeed, "OLC has a powerful tradition of adhering to its past opinions, even when a head of the office concludes that they are wrong." *Id.* at 145. That OPR (and even a future OLC opinion) disagrees with this conclusion is utterly irrelevant.

OPR's criticism elevates disagreements over constitutional text and history to an ethics violation—any reading other than OPR's becomes unethical. That is the function of reply briefs and healthy internal debates, not ethics inquiries.

d. The decision not to reiterate Take Care Clause jurisprudence is appropriate

Finally, OPR criticizes the Bybee Memo for failing to "reconcile[]" the "Take Care" Clause (U.S. Const. art. II, § 3) with the Commander-in-Chief Clause. Draft Report at 204. This argument is unavailing as well.

Once again, OPR did not bother to consult OLC precedent, which has already settled the matter and does not necessarily cite the Take Care Clause. For example, in 1993, OLC explained, without mentioning the Take Care Clause, that "the President may resist laws that encroach upon his powers by 'disregard[ing] them when they are unconstitutional.'" *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 133 (Nov. 3, 1993) (citation omitted); *see also*, *e.g.*, *Dellinger 1996 Opinion* (finding provision unconstitutional under Commander-in-Chief Clause without mentioning Take Care Clause); *Shiffrin 1995 Opinion* at 1-2 (same). Indeed, without considering whether the Take Care Clause counseled a different result, the current OLC recently issued an opinion holding that the administration "may disregard" a statutory provision that "unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy." *Barron 2009 Opinion* at 1. In fact, OLC cited the Take Care Clause in *support* of its conclusion upholding presidential authority in the face of a contrary statute. *Id.* at 4-5.

OLC has long taken the position that "the Take Care Clause does not compel the President to execute unconstitutional statutes" because "[a]n unconstitutional statute is not a law." *Issues Raised By Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 47 (Feb. 16, 1990) (Barr) (citing Hamilton). In fact, "[t]he President's authority to refuse to enforce a law that he believes is unconstitutional derives from his duty to 'take Care that the Laws be faithfully executed,' U.S. Const. art. II, § 3 and the obligation to 'preserve, protect and defend the Constitution of the United States' contained in the President's oath of office. U.S. Const. art. II, § 1." *Id.* at 46. As OLC explained, "the Constitution is a law within the meaning of the Take Care Clause"; thus, "[w]here a statute enacted by Congress conflicts with the Constitution, ... [t]he resolution of this conflict is clear: the President must heed the Constitution." *Id.* at 46-47; *see also* Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, at 16 (Sept. 17, 1977) ("[T]he President's duty to uphold the Constitution carries with it a prerogative to disregard unconstitutional statutes."), *quoted in* Memorandum Op. for the Counsel to the President from Timothy Flanigan, *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports* (Jan. 17, 1992).[118] The same hierarchy holds true as to treaties.[119] In other words, OLC has already "reconciled the Commander-in-Chief clause with the Take Care clause." Report at 204.

There is an obvious tension in OPR's suggestion that the President would have to "take care" to execute a statute that is an unconstitutional abrogation of his powers as Commander-in-Chief. As Chief Justice Chase long ago pondered, "[h]ow can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no *right* to *defend* it against an act of Congress sincerely believed by him to have been passed in violation of it?" Letter from Chief Justice Chase to Gerrit Smith, Apr. 19, 1868, *quoted in* J. W. Schuckers, *The Life and Public Services of Salmon Portland Chase* 578 (1874). But prior OLC opinions have already resolved the tension. Indeed, the executive's existing understanding is borne out by the prevalence of signing statements, in which Presidents announce their opposition without citing, or running afoul of, the Take Care Clause.

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[118] *See also, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 203-11 (Dellinger) (collecting sources); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 50 (Feb. 16, 1990) ("[I]n the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws."); *Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731 ("The Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the acts of Congress, and cases arise in which the duty to the one precludes the duty to the other."); *Statement of James Wilson on December 1, 1787 on the Adoption of the Federal Constitution, reprinted in 2 Jonathan Elliot, Debates on the Federal Constitution* 418, 445-46 (1836) ("[T]he President of the United States could ... refuse to carry into effect an act that *violates* the Constitution.") (emphasis in original), *quoted in Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 208.

[119] *See The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1871) ("It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."); *see also Shiffrin 1995 Opinion* at 3 ("The Constitution reserves execution of the law, including treaties, to the Executive Branch."); *Transfer Opinion* at 2 n.1 ("To the extent that ... treaties [such as the Convention Against Torture] would cabin presidential freedom to transfer detainees, they could not constrain his constitutional authority.").

That said, it is unclear why OPR stresses that international treaties (like statutes) are the law of the land (Report at 204), given that that the only law at issue in the Bybee Memos is the statutory criminal law. Bybee Tr. 105 ("We weren't asked to interpret the treaty; we were asked to interpret the [statutory] law here."). And, to the extent OPR states or implies that norms of *jus cogens* somehow affect the analysis of Article II authority, OPR is simply imposing its own policy preferences, contrary to OLC precedent. *See supra* Section III.A.3. In fact, OLC has previously explained at length that "customary international law would not bind the President." Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 32 (Jan. 22, 2002) (citing, *inter alia*, *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163 (June 21, 1989)); *see generally id.* at 32-37. Indeed, "[i]mporting customary international law notions concerning armed conflict would represent a direct infringement on the President's discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation's military affairs. Presidents and courts have agreed that the President enjoys the fullest discretion permitted by the Constitution in commanding troops in the field." *Id.* at 36. As Chief Justice Marshall stated, customary international law "'is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet *it may be disregarded*.'" *Id.* at 34 (quoting *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814)).

Consistent with this well-established understanding, the Bybee Memo itself *did* reconcile the Take Care Clause, stating that it "cannot compel the President to prosecute outcomes taken pursuant to the President's own constitutional authority" because otherwise Congress "could control the President's authority through the manipulation of federal criminal law." Bybee Memo at 36. OPR apparently just prefers a different result—a judgment that, of course, is outside its purview. *In re Stanton*, 470 A.2d at 287. OPR gets it precisely backwards: the Take Care Clause, in OLC's view, does not constrict the scope of the President's inherent authority—if anything gives the President *more* discretion (akin to prosecutorial discretion) as to how to enforce the laws, and it directs the President to adhere to the constitution (the higher law) in the face of a conflicting treaty or statute (an inferior law).

In any event, the debates over the President's Take Care duty and his other powers (such as the Commander-in-Chief authority) are at the heart of separation of powers. A full-length discussion of such fundamental arguments, sweeping in nearly all of the discussions of executive power, would have been an endless exercise.

In sum, properly judged against the backdrop of OLC precedent (which OPR studiously ignores), not one of OPR's supposed omissions in its Commander-in-Chief analysis constitutes an error, let alone rises to a reckless breach of professional duty. Instead, they merely reflect OPR's misguided attempt impose its own legal and policy judgments where they emphatically do not belong.

G. Common Law Criminal Defenses

The final section of the Bybee Memo discussed two possible defenses to violations of the anti-torture statute: the necessity defense and self-defense. As detailed above, *supra* Section IV.F, the evidence indicates that the client requested the addition of this section around July 16, 2002, just over two weeks prior to the eventual deadline. Report at 52. During that same period, OLC also had to complete the requested analysis of the Commander-in-Chief power as well as draft the Classified Bybee Memo. In its critique of the defenses section, OPR raises a laundry list of complaints, most of which are irrelevant to Judge Bybee in his supervisory capacity. "At various points," OPR elaborates, the defenses section "advanced novel legal theories, ignored relevant authority, failed to adequately support its conclusions, and relied on questionable interpretations of case law." *Id.* at 207. Upon closer review, however, it becomes apparent that OPR is distorting the evidence to sustain its unsupported contention that OLC intended these defenses to provide a "readily available" immunity from prosecution. *Id.* at 231. To the contrary, the section provided a general overview of the two defenses and used entirely conditional, cautious, and equivocal language throughout. *See supra* Section II.E; Exhibit 18. At no point does the Bybee Memo ever conclude that either defense *will* negate liability under the anti-torture statute. As Judge Bybee made clear to OPR, "all we've said is that a necessity defense might be available; we didn't say that it is available; we've just said it might be available." Bybee Tr. at 96. Put in the proper context, the defenses section provides a careful assessment of a difficult area of law that to Judge Bybee's eye was adequately supported with case law, treatises, and academic commentary.

1. The Necessity Defense

OPR levels a number of petty and groundless criticisms at OLC's analysis of the necessity defense. We address each in turn.

First, OPR faults the Bybee Memo for citing *United States v. Bailey*, 444 U.S. 394, 410 (1980), for the proposition that "the Supreme Court has recognized the [necessity] defense," but not citing the majority opinion in *United States v. Oakland Cannabis Buyer's Cooperative*, 532 U.S. 483, 490 n.3 (2001), which opined that it was "incorrect to suggest that *Bailey* has settled the question whether federal courts have authority to recognize a necessity defense not provided by statute." Report at 208-09. This criticism is unfounded for a number of reasons.

As a preliminary matter, OPR acknowledges that "Judge Bybee was unaware of the *Oakland* decision when the memorandum was drafted." Report at 209 n.163. It necessarily follows, then, that Judge Bybee was not in a position to "accurately and objectively" discuss the effect of supposedly "adverse authority" like *Oakland* on OLC's analysis. *Id.* at 228. As discussed at length above, *see supra* Section II, Judge Bybee carried out his supervisory duties with great care, but lacked the time to review all the applicable case law. OPR itself concedes that Judge Bybee "did not conduct the basic research that went into the memoranda" and was not "responsible for checking the accuracy and completeness of every citation." Report at 255. OPR goes on to contend that Judge Bybee "assumed the responsibility for investigating problems that were apparent in the analysis or that were brought to his attention by others" (*id.*), but neither condition applies in this instance. To all appearances *Bailey* remained good law, and there is no evidence that Yoo, [redacted] or Philbin were aware of *Oakland* either.[120] *Id.* at 209 & n.163. In short, although Judge Bybee told OPR he "hope[d] that [his staff] would have seen [*Oakland*]" (Bybee Tr. at 97), he cannot be held responsible for their apparent failure to do so.

In any event, *Oakland* is hardly the bombshell that OPR makes it out to be. As Judge Bybee told OPR, *Oakland* "does not have any impact on th[e] analysis" because the Bybee Memo only "said ... that a necessity defense *might* be available." *Id.* at 95-96. In *Oakland*, Judge Bybee noted, "Justice Thomas ... calls into question the necessity defense, comes right to the brink of overruling [*Bailey*], does not overrule [*Bailey*], and then spends the next three pages telling us why the necessity defense wasn't applicable in that case." *Id.* at 95. If *Oakland* had held that "there was no necessity defense," Judge Bybee reasoned, the Court majority "could have stopped the opinion right there and saved themselves about three or four pages." *Id.* at 96. Rather, the necessity defense remained a *possibility* both before and after *Oakland*, and thus the memo is "perfectly consistent" with that case. *Id.* This conclusion finds support in post-*Oakland* case law, where a number of lower courts have permitted defendants to raise the necessity defense in prosecutions under a federal statute.[121] *See, e.g.*, *United States v. Tokash*, 282 F.3d 962, 969 (7th Cir. 2002) (allowing defendant to raise defense of necessity but rejecting claim); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (same); *United States v. Maxwell*, 254 F.3d 21, 26 (1st Cir. 2001) (same); *United States v. Kpomassie*, 323 F. Supp. 2d 894, 899-900 (W.D. Tenn. 2004) (denying government's motion to prohibit use of necessity defense and holding that defendant made a prima facie showing to support the defense). Most important, the Supreme Court vindicated the Bybee Memo's assessment of *Bailey* a mere six months after Judge Bybee's interview with OPR. In *Dixon v. United States*, 548 U.S. 1, 6 (2006), the Court stated that "the defense of necessity that we considered in [*Bailey*] may excuse conduct that would otherwise be punishable."[122] *Dixon* was authored by Justice Stevens and, critically, joined by Justice Thomas who authored the majority opinion—and the controversial *dicta*—in *Oakland*. Indeed, *Dixon* cites precisely the same pages of *Bailey* as did the Bybee Memo. *Compare Dixon*, 548 U.S. at 6, *with* Bybee Memo at 40. *Oakland*'s *dicta* regarding *Bailey*'s assessment of the necessity defense has been put to rest.

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[120] This was an understandable oversight. Even the Supreme Court and the Solicitor General's Office have on occasion overlooked relevant or even potentially dispositive material. For example, last year in *Kennedy v. Louisiana*, 127 S. Ct. 2641 (2008), in holding unconstitutional the death penalty for the crime of child rape, the Court relied in part on its observation that it was a capital offense in only six states, and in no other state or federal jurisdiction. But none of the Court's opinions (majority or dissent) and none of the parties' briefs (ten of them) took into account the fact that in 2006 Congress had prescribed capital punishment as a penalty available for the rape of a child by someone in the military. Notably, the Solicitor General's Office sent the Court a formal apology for its oversight. No attorneys or jurists were referred to the bar for failing to identify the provision.

Second, OPR accuses the Bybee Memo of failing to include "an element-by-element analysis of how the [necessity] defense would be applied to a government interrogator accused of violating the torture statute." Report at 211. This criticism is utterly baffling given that the Bybee Memo contained a standard definition from the Model Penal Code and provided a thorough discussion of the black letter law on necessity—including a list of "[a]dditional *elements* of the necessity defense"—citing extensively to the leading treatise on criminal law: La Fave & Scott's *Substantive Criminal Law*.[123] Bybee Memo at 39-41 (citing LaFave & Scott nine times). OPR insinuates that these sources are inadequate (Report at 207) and instead of citing additional or different treatises, elects to cobble together its own list of "elements" from a review of court of appeals cases "and other judicial opinions." *Id.* at 210-11. With respect, OPR's list of elements (which "most" courts have supposedly endorsed) is hardly authoritative, as even

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[121] With regard to federal case law more generally, OPR mischaracterizes Judge Bybee's interview, claiming that he "stated that a discussion of existing federal case law on the necessity defense was not needed in the Bybee Memo because the reported cases were 'far afield' from a 'ticking time bomb' situation." Report at 210. While it is true that the cases OPR cites are factually distinguishable—and thus there was no need for OLC to note that courts often reject the necessity defense (Report at 220)—Judge Bybee's comment was in response to a question that focused on "the context of abortion clinic cases," which are indeed, as Judge Bybee stated, "pretty far afield." Bybee Tr. at 97; *id.* at 97-98 ("I would hate to have to [parse] through abortion cases to figure out whether a ticking time bomb was [analogous] to abortion cases."). The primary reason OLC omitted the cases is that they were redundant: they simply re-affirmed the common understanding that *Bailey* recognized the necessity defense. *See, e.g.*, *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990) (citing *Bailey* as holding that "prosecution for escape from a federal prison, despite the statute's absolute language and lack of a *mens rea* requirement, remained subject to the common law justification defenses of duress and necessity"); *United States v. Gant*, 691 F.2d 1159, 1161 (5th Cir. 1982) (rejecting the government's argument that duress and necessity should be considered, if at all, only in mitigating the penalty assessed after conviction because "[t]he teachings of the Supreme Court in [*Bailey*] ... indicate otherwise" and stating that "[i]n *Bailey* the Court determined that the justification defenses of duress and necessity are generally available ... despite the statute's absolute language and lack of a mens rea requirement"). Whether to exclude such extraneous citations in the substantive analysis to avoid overwhelming the client is exactly the type of judgment call that should not be second-guessed. *See In re Stanton*, 470 A.2d at 287.

[122] OPR's description of *Dixon* (Report at 208 n.162) conveniently neglects to mention the Court's plain reference to the necessity defense along with the defense of duress.

[123] A Westlaw search reveals that the Supreme Court itself has cited LaFave & Scott in its opinions over 130 times.

OPR concedes that "the defense varies slightly among the circuits." *Id.* at 210. Regardless, OPR's assertion that these elements "differ" from those set forth in the Bybee Memo (*id.*) is shameless flyspecking. As outlined below, every element identified by OPR was addressed adequately in the Bybee Memo. *Compare id.* at 211-215, *with* Bybee Memo at 31 n.17, 40-41.

Element One: "*[T]he defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury.*" Report at 210. OPR admits that the Bybee Memos "briefly acknowledged this issue," but contends that OLC "did not explain how a government interrogator with a prisoner in physical custody would make such a showing." *Id.* at 211. Yet the Bybee Memo noted two key factors in its analysis: the government's level of certainty that "a particular individual has information needed to prevent an attack" and the probability "that a terrorist attack is likely to occur." Bybee Memo at 41. While perhaps not speaking directly to the element of timing, this passage certainly mandates a "well-grounded threat of death or serious injury." Report at 211. Indeed, this discussion demonstrates the conditional nature of OLC's assessment of the availability of the necessity defense; an agent with tenuous information about an uncertain attack could not "appropriately" invoke the necessity defense. Bybee Memo at 41.

In addition, OLC raised the issue of imminence more explicitly in an earlier section, describing it as a "requirement" of the necessity defense. Bybee Memo at 31 n.17. Specifically, this passage addressed the "ticking time bomb hypothetical" raised by the Court in *Israel*. OPR attempts to challenge this hypothetical by citing scholars who have "argued that the scenario is based on unrealistic assumptions and has little, if any, relevance to intelligence gathering in the real world." Report at 212 n.168. The likelihood of such a scenario, however—and, with respect, we are doubtful how much legal scholars (let alone OPR) know about "intelligence gathering in the real world"—is beside the point. The phrase "ticking time bomb" is a figure of speech meant to illustrate a range of hypothetical situations and as such is not meant to be taken literally—such as requiring an attack "within hours or minutes." *Id.* Even though reasonable minds can disagree on this issue, leading scholars, jurists, and politicians from across the political spectrum have opined that the ticking time bomb scenario is a legitimate concern that might justify extreme measures.[124]

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[124] *See, e.g.*, **Former President Clinton** ("[If] we get the number three guy in al-Qaeda, and we know there's a big bomb going off in America in three days, we know this guy knows where it is, we have the right and the responsibility to beat it out of him."). (Transcript, Meet the Press, Sept. 30, 2007, *available at* http://www.msnbc.msn.com/id/21065954/ns/meet_the-press_online_at_msnbc/); **Supreme Court Justice Antonin Scalia** ("There are no easy answers involved, in either direction, but I certainly know you can't come in smugly and with great satisfaction and say, 'Oh, this is torture, and therefore it's no good.'" "You would not apply that in some real-life situations.") (Jan Crawford Greenburg, *Does Terror Trump Torture?*, ABC News, Feb. 12, 2008, *available at* http://blogs.abcnews.com/legalities/2008/02/does-terror-tru.html); **Seventh Circuit Judge Richard Posner** ("If torture is the only means of obtaining the information necessary to prevent the detonation of a nuclear bomb in Times Square, torture should be used" "No one who doubts that this is the case should be in a position of responsibility."), *available at* http://www.tnr.com/article/the-best-offense. *The Best Offense*, The New Republic, Sept. 5, 2002 (book review of *Why Terrorism Works*, by Alan Dershowitz). **Senator Charles Schumer** ("[T]here are probably very few people ... in America who would say that torture should never ever be used, particularly if thousands of lives are at stake. Take the hypothetical. If we knew that there was a nuclear bomb hidden in an American city, and we believed that some kind of torture, fairly severe maybe, would give us a chance of finding that bomb before it went off, my guess is most Americans and most Senators, maybe all, would do what you have to

OPR also claims that "none of the information presented to OLC [about the CIA detainees] approached the level of imminence and certainty associated with the 'ticking time bomb' scenario." *Id.* "Although the OLC attorneys had good reasons to believe that the detainees possessed valuable intelligence about terrorist operations in general," OPR continued, "there is no indication that they had any basis to believe the CIA had specific information about terrorist operations that were underway, or that posed immediate threats." *Id.* While we have not been made privy to any of the CIA's communications with OLC, Philbin's submission to OPR flatly contradicts its claim. As discussed above, *supra* Section II.C, Philbin noted that [redacted] Philbin Submission at 3-4. Nor was this a distant threat, but one "intended to coincide roughly with the first anniversary of September 11, 2001," a matter of weeks away. Philbin Submission at 3. [redacted] Philbin Submission [redacted] OPR either overlooked these facts or consciously withheld them.

Finally, OPR asserts that "any reliance upon the 'ticking time bomb' scenario to satisfy the imminence prong of the necessity defense would be unwarranted in this instance, as the EITs under consideration were not expected or intended to produce immediate results. Rather, the goal of the CIA interrogation program was to condition the detainee gradually in order to break down his resistance to interrogation." Report at 212 n.168. This too is a mischaracterization of the facts and is shockingly presumptuous regarding OPR's awareness of the intricacies of the CIA's interrogation program. The CIA's program may have been based on the theory of "learned helplessness" (*id.* at 40), but we are aware of no evidence indicating how "gradual[]" that learning process had to be. The Classified Bybee Memo, after all, stated (at 1) that use of the EITs would "likely last no more than several days," and [redacted] If time were of the essence, moreover, presumably the CIA could accelerate or skip techniques, resorting to the waterboard which was known to be [redacted] In other words, just because the necessity defense might not pertain to the *typical* CIA interrogation does not mean that it would be unavailable in all cases.

Element Two: "*[T]he defendant did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct.*" Report at 211. This issue is irrelevant and OPR did not discuss it further.

Element Three: "*[T]he defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm.*" Report at 211. In its own list of elements, however, the Bybee Memo stated that a "defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm." Bybee Memo at 40. OPR concedes that the Bybee Memo identified this element (Report at 213 n.169), but objects to OLC's "distill[ation]" of the point, concluding that

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do. So it is easy to sit back in the armchair and say that torture can never be used, but when you are in the foxhole it is a very different deal."). *Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (June 8, 2004).

it "merited a more complete discussion." Report at 213, 212. One begins to wonder what would satisfy OPR on this score. OLC noted in this section that "the strength of the necessity defense depends on the circumstances that prevail, *and the knowledge of the government actors involved,* when the interrogation is conducted." Bybee Memo at 41. It follows that if the interrogator *knew* the extreme techniques were unnecessary, his necessity defense would fail. The Model Penal Code definition included in the Bybee Memo likewise described the defense as "[c]onduct that the actor *believes to be necessary* to avoid a harm or evil to himself or to another." Bybee Memo at 39. In light of these passages, there was no need for OLC to spell out precisely "how an interrogator could prove this element." Report at 214. After all, the entire basis for the CIA's request to use EITs was that traditional interrogation methods were insufficient. As National Security Advisor John Bellinger informed OLC, "without the interrogation program and the use of specific interrogation techniques, the CIA did not believe that they could get the information necessary to prevent the attacks and save American lives." *Id.* at 38. In other words, the absence of a legal alternative to acquire the needed information was implicit in the CIA's request for advice and did not need further explication.

Element Four: "*[A] direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.*" Report at 211. OLC addressed this issue too. It noted that the necessity defense is more likely to succeed "the more certain that government officials are that a particular individual has information needed to prevent an attack." Bybee Memo at 41. It should go without saying that one could "reasonably anticipate[]" that "a direct causal relationship" exists between acquiring information "needed to prevent an attack" and actually preventing the attack and thereby "avoid[ing] ... the threatened harm." Notwithstanding this, OPR appears to doubt the existence of a "real-world situation" involving "an immediate, impending attack." Report at 214. As mentioned with regard to element one, however, Philbin told OPR that the existence of an impending attack was not only plausible, but actually existed at the time OLC drafted the Bybee Memos.[125] OPR must be wearing blinders.

Third, OPR claims (*id.* at 214-220) that OLC gave an intentionally one-sided account of what the Bybee Memo described as "an important exception" to the necessity defense: that it is available "only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values." Bybee Memo at 41 (citation omitted). In brief, the Bybee Memo flagged this issue but concluded that Congress had *not* "made a determination of values" with regard to the availability of common law defenses. *Id.* at 41 n.23. The memo reasoned that the CAT included an express provision "bar[ring] a necessity or wartime defense" but that Congress elected to omit this section when it incorporated other provisions of the CAT into domestic law. *Id.*

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[125] The truth regarding the precise nature of the threat posed by Jose Padilla may never be known. OPR quotes former Attorney General Ashcroft's press statement that Padilla was merely "*exploring a plan* to build and explode" a dirty bomb as proof that the threat was quite distant. Report at 214 n.171 (emphasis added by OPR). [redacted]

Even if this were not the best reading of the legislative history in its entirety, as OPR contends, this has nothing to do with Judge Bybee. He did not review the legislative history. The passage in question is logical on its face and Judge Bybee would have no reason to question its accuracy. Nor is there any evidence that the issue was raised with him. OPR puts great weight on the fact that "the *drafters* of the Bybee Memo knew" about contradictory facts in the historical record, but they rely solely on an email exchange between Yoo and [redacted] Report at 217-19.

In any event, OLC drew a perfectly reasonable conclusion from the relevant ratification and legislative history. OPR falsely asserts that "the memoranda did not refer to or discuss the relevance of article 2(2) of the Convention Against Torture, which explicitly states that no exceptional circumstances can be invoked to justify torture." *Id.* at 229. Quite the contrary, the Bybee Memo specifically quoted article 2(2) and noted the key fact that Congress *did not incorporate* it into the anti-torture statute. Bybee Memo at 41 n.23. As Judge Bybee explained to OPR, "CAT was not self-executing, which is why Congress ... was obligated to enact separate domestic legislation." Bybee Tr. at 104. Consequently, Judge Bybee reasoned, where a "treaty specifically says there will be no necessity defense," and Congress fails to adopt that provision, it "is a permissible inference that the defense is still available."[126] *Id.* The same holds true for article 1(1), which the Bybee Memo also quoted in relevant part.[127] Bybee Memo at 41 n.23. OPR tries to refute this basic logic by arguing that "if Congress had intended to allow the necessity defense to apply to the torture statute, it could have made an explicit statement to that effect." Report at 216. But that gets the standard backward. The necessity defense is presumptively available *unless* Congress makes a determination of values, not *until* Congress does so. In other words, if Congress had intended to *prohibit* the availability of the necessity defense, it should have done so with an explicit statement to that effect—such as incorporating article 2(2) of the CAT.[128] It did not.

OPR also claims that the CAT ratification history "undermined or negated" the Bybee Memo's position regarding the necessity defense. Report at 217. Not so. OPR's argument rests on the decision of the first Bush administration to delete the CAT understanding originally proposed by the Reagan administration, which stated: "The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others." Senate Report at 16. By abandoning this Reagan administration understanding, OPR infers that the Bush administration determined that CAT article 2(2) *did* "preclude the availability" of common law defenses. That is a debatable inference because there is some evidence that the Bush administration merely determined that the Reagan reservation was "no longer necessary." *Id.* at 37. But even if OPR's inference is correct, this conclusion does not "undermine[] or negate[]" the Bybee Memo's conclusion. It would simply lend greater significance to Congress's ultimate decision not to incorporate article 2(2) in the anti-torture statute. Given that the outcome was the same, there was no need for the Bybee Memo to reprise such a lengthy and complex ratification history. And even if there were such a duty, OPR cannot fault Judge Bybee in any way for this failure.

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[126] OPR contends that this argument is flawed because it assumes "that Congress intended to enact implementing legislation for one section of CAT that was inconsistent with the clear terms of another section." Report at 216. But the supposed inconsistency is of OPR's own making. It would be nonsensical for a court to construe the anti-torture statute in light of the very provision that Congress omitted. OPR's point would make more sense, as the Bybee Memo argued (Bybee Memo at 31), in the context of a country that had not reached a decision regarding article 2(2).

[127] OPR's argument that the Bybee Memo's interpretation of article 1(1) is unwarranted in light of article 2(2) (Report at 216) erroneously presumes that two provisions of the same treaty could never be mutually reinforcing. Indeed, it is possible that Congress elected to omit both provisions for similar or identical purposes.

[128] OPR claims that the Bybee Memo "failed to point out ...that the fact that Congress has not specifically prohibited a necessity defense does not mean that it is available." Report at 216 (quoting *Oakland*, 532 U.S. at 491 n.4) ("We reject the Cooperative's intimation that elimination of the defense requires an explicit statement."). But that principle is implicit in the Bybee Memo's analysis. The memo makes clear that even though "Congress has not explicitly made a determination of values vis-à-vis torture," it remains an open question whether the necessity defense is available. Bybee Memo at 41. The Bybee Memo only argues that in light of Congress's omission of article 2(2) from the anti-torture statute, it "read[s] Section 2340 as permitting the defense." *Id.* at 41 n.23. There is no argument that the statute *must* be read in such a fashion, so courts would be free to conclude, consistent with *Oakland*, that the defense is unavailable despite Congress's omission.

2. Self-defense

OPR repeats a number of the same criticisms in its critique of the Bybee Memo's analysis of self-defense. They fare no better.

First, OPR asserts that the Bybee Memo's "description of the doctrines of self-defense and defense of others was based on secondary authorities—La Fave & Scott and the Model Penal Code." Report at 220. "There was no analysis or discussion," OPR continues, "of how the defense has been applied in federal court, and no review of federal jury instructions for the defense." *Id.* Yet OPR notably does not contend that the memo omitted any precedent that would undermine its explanation of the elements of the offense or that this analysis was incorrect. The Bybee Memo actually relies not only on La Fave & Scott and the Model Penal Code, but also repeatedly cites a third eminent source on the subject that OPR apparently overlooked: Paul Robinson's *Criminal Law Defenses.* Combining these sources, the Bybee Memo sets forth in detail the key elements of the doctrine of self-defense. There is no need to cite cases when the leading treatises establish the key elements. This is particularly true in light of the memo's observation that success of the claim will "depend on the specific context within which the interrogation decision is made." Bybee Memo at 43. The Bybee Memo had no need to recount cases involving "the usual self-defense justification" because, as it noted, "this situation is different." *Id.* at 44. It is unreasonable for OPR to demand cumulative citations, particularly given the limited period available for OLC to draft the defenses section.

Second, OPR contends that the Bybee Memo misrepresented the level of support for the "position that torture could be justified under U.S. law by the common law doctrine of self-defense." Report at 228. Specifically, OPR argues that a law review article by Professor Michael Moore referenced in the Bybee Memo provided *no support* for this argument.[129] *Id.*

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[129] OPR vigorously objects to the Yoo Memo's inclusion of an article by Alan Dershowitz, which OPR contends "does not address the doctrine of self-defense." Report at 222. OPR believes that Yoo "knew he was exaggerating the legal authority for this argument and consciously chose to conceal that fact." Report at 221. This alleged error has nothing to do with Judge Bybee, who was the person that brought the inconsistency regarding the plural use of the word "commentators" to Yoo's attention in the first place. Report at 221. Judge Bybee's role in this exchange demonstrates that he was hardly seeking to misrepresent the secondary authority supporting OLC's arguments.

OPR justified this sweeping conclusion based on its view that the Moore article "represented Moore's personal views," "cited more scholarly and philosophical works than legal authorities, and made no attempt to summarize or analyze United States law." *Id.* at 222-23; *see also id.* at 223 n.179 (noting that Moore introduced his conclusions with the phrases "to my mind" and "[m]y own answer to this question is...."). But OLC never claimed to use Moore for any other purpose than his "personal views." The Bybee Memo makes clear that it is only discussing what "scholarly commentators *believe* ... would be justified under the doctrine of self-defense." Bybee Memo at 44. The passage that the Bybee Memo quotes from the Moore article likewise states only that torture in certain circumstances "*should* be permissible," not that courts *would* find it permissible. *Id.*

Nor did the Bybee Memo utilize the Moore article to characterize its argument as a "standard" criminal law defense. Report at 223. Rather, it introduced the paragraph in question with the following disclaimer: "To be sure, this situation is *different from the usual* self-defense justification."[130] Bybee Memo at 44. OPR tries to marginalize this sentence as "only one qualification," claiming that "[t]he Bybee Memo did not make clear that extension of these defenses to prosecutions for torture would be novel." Report at 231. OPR, in fact, takes its argument one step further and asserts that the self-defense section "gave the impression that the defense would be readily available." *Id.* If by "readily available" OPR means available as a matter of law, OLC properly assumed that self-defense can be an appropriate defense given the "absence of any textual provision to the contrary." Bybee Memo at 42; *see also supra* Section IV.G.1 (noting that Congress omitted the CAT provision foreclosing common law defenses when passing the anti-torture statute). But OLC never implied that courts would readily grant a self-defense claim. Indeed, the very two sentences that OPR quotes from the Bybee Memo (Report at 231) suffice to prove this point. Bybee Memo at 42 ("a defendant *could* still appropriately *raise* a claim of self-defense"); *id.* at 43 ("a defendant ... *could have*, in certain circumstances, grounds to properly claim the defense of another."). "Whether such a defense will be upheld," OLC concluded, "depends on the specific context within which the interrogation decision is made." *Id.*

Third, OPR argues that the Bybee Memo's citation to *In re Neagle*, 135 U.S. 1 (1890), did not "provide adequate support for the statement that 'the right to defend the national government can be raised as a defense in an individual prosecution' for torture." Report at 228. To be sure, *Neagle* involves an "unusual factual background" (*id.* at 224 n.183) and is not a direct precedent given that it involved consideration of the federal *habeas corpus* statute. *Id.* at 223. But the Bybee Memo never claimed otherwise. OLC presented *Neagle* in a very cautious manner, noting that it was relevant only "*[i]f* the right to defend the national government can be raised as a defense." Bybee Memo at 45. Moreover, while *Neagle* may have dealt with a more limited use of inherent executive power to protect the domestic interests of the United States (the life of Justice Field, traveling in California), it has frequently been cited for broader purposes. Indeed, OLC opinions repeatedly rely on it when addressing national security interests abroad.[131] *See, e.g.*, *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 177 (June 21, 1989) (Barr) (noting, in opinion authorizing the FBI to arrest suspects abroad, that "[t]he Neagle Court pointed particularly to the President's power in the area of foreign affairs as an area in which there exists considerable inherent presidential power to authorize action independent of any statutory provision"); *Proposed Interdiction of Haitian Flag Vessels*, 5 Op. O.L.C. 242, 245 (Aug. 11, 1981) (Olson) (noting, in opinion authorizing the Coast Guard to intercept Haitian vessels that may contain refugees, that the President's "power to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in *In re Neagle*"); *see also* Peter M. Shane & Harold H. Bruff, *Separation of Powers: Cases and Materials* 53 (2d ed. 2005) ("*Neagle* is invariably cited in Department of Justice legal memoranda as legitimating a broad implied power to take all steps necessary and proper for the enforcement of federal law.").

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[130] This sentence is more than adequate to "make[] clear to the client that the advice is an extension of existing law." Report at 231. Further, as discussed in Section III.B.2, *supra*, there is no corresponding duty to present the client with "countervailing arguments against such a position." Report at 231. Regardless, the Bybee Memo did so, noting that "[i]n the current circumstances ... an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather, he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization." Bybee Memo at 44. This is clearly a counterargument that any prosecutor would raise in response to a self-defense claim.

OPR's efforts (Report at 224 n.183) to distinguish these opinions by noting that they cited authority other than *Neagle* or involved a different fact pattern to the one presented in the Bybee Memo are lame. The fact remains that *Neagle* has not been limited to its obscure origins as OPR appears to prefer. Regardless, even if the Bybee Memo's assessment of *Neagle* is incorrect, it was reasonable for Judge Bybee to rely on the accuracy of this particular citation in the absence of contrary evidence.

Fourth, OPR identifies what it believes to be a double standard regarding how OLC characterizes the term "imminent." Report at 229-30. On the one hand, the Bybee Memo describes "threat[s] of imminent death" for purposes of constituting a predicate act under 18 U.S.C. § 2340(2) as requiring "the threat to be almost immediately forthcoming." Bybee Memo at 12. On the other hand, in the self-defense section, the Bybee Memo states that "[i]t would be a mistake ... to equate imminence necessarily with timing—that an attack is immediately to occur." Bybee Memo at 43. OPR asserts that the Bybee Memo adopted these apparently contradictory definitions "to advance a permissive view of the torture statute." Report at 229.

To the contrary, there are key differences between the two contexts that justify this distinction and demonstrate that OLC was taking great care in how it defined the relevant terms. The first definition of imminence, for example, relates to a predicate act under the anti-torture statute, or conduct that would constitute torture if it resulted in prolonged mental harm. This definition requires temporal immediacy because threats to carry out acts in the future—even very serious threats—do not have the same likelihood of taking place and thus are less likely to cause severe mental pain or suffering to the threatened person. *See* Bybee Memo at 12 ("[T]iming is an indicator of certainty that the harm *will* befall the defendant.") (emphasis in original).

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[131] OPR objects to the Bybee Memo's inclusion of authorities suggesting that the United States was acting in self-defense under international law in its response to the September 11 attacks. Report at 225. OPR faults OLC for not "explain[ing] how those authorities would apply to a criminal prosecution, or how they would 'bolster' an individual's claim to self-defense in federal court." *Id.* But the connection is fairly straightforward. The Bybee Memo makes clear that an individual's defense under *Neagle* depends on his conduct being "properly authorized" and "justified on the basis of protecting the nation from attack." Bybee Memo at 45. The final paragraph of the self-defense section is only establishing the predicate fact that the United States is indeed acting in self-defense and is justified in doing so. Likewise, the Bybee Memo's citation to *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), was not meant to speak to self-defense in particular (Report at 225 n.184), but was meant to demonstrate the frequency with which the President carried out his power to use the armed forces to protect the country.

By contrast, the second definition of imminence relates not to the timing of *threats* but to the timing of necessary *responses* to threats. *See* Bybee Memo at 43 (referencing the Model Penal Code for the proposition that "the defensive *response* must be 'immediately necessary.'") (emphasis in original). That is why, *for the purposes of self-defense*, the Bybee Memo stated that imminence does not necessarily require that an attack be "immediately about to occur." Bybee Memo at 43. One can envision hypotheticals, as OLC provided (*id.*) ("[I]f A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense, even if the opportunity arose before the week had passed.") (citations omitted), that would justify an immediate defensive response even if the threatened harm was not so imminent as to constitute a predicate act with the potential to cause severe mental pain.[132] As the Bybee Memo explained, "[i]n this hypothetical, while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A." *Id.* In other words, OPR creates its own inconsistency by assuming that the word "imminent" has to mean the same thing in all situations. OLC properly appreciated the different use of this term in the anti-torture statute as compared to the common law of self-defense.

H. The Classified Bybee Memo

OPR concludes that the Classified Bybee Memo also "did not constitute thorough, objective, and candid legal advice" and that Judge Bybee bears responsibility because he "reviewed and signed" it. Report at 234, 255. OPR predicates that finding on three alleged shortcomings in the memo: (1) it "did not consider the United States legal history surrounding the use of water to induce the sensation of drowning and suffocation in a detainee"; (2) it relied on data and reports derived from the SERE training of U.S. military personnel, which would not necessarily replicate the experience [redacted] and (3) it did not adequately analyze how the CIA would carry out the sleep deprivation and stress position interrogation techniques. *Id.* at 234-37.

OPR contends that Judge Bybee is responsible for these alleged deficiencies even though it offers no evidence that anyone ever raised these issues with him. Indeed, it is undisputed that *no one ever raised doubts of any kind* about the analysis in the Classified Bybee Memo. As discussed, *supra* Section IV.D, Patrick Philbin informed OPR, "[t]here was 100% agreement among officials in the Department who had been briefed (including the Attorney General, the Deputy Attorney General and the AAG for the Criminal Division) that even the harshest of the practices (waterboarding) did not constitute torture as defined in the statute." Yet OPR somehow expects Judge Bybee to have discovered obscure military history overlooked by numerous other lawyers—including Levin, Bradbury, DOD counsel, and OPR investigators. OPR also expected

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[132] In this sense, OPR's proposed hypothetical (Report at 230) is not as outlandish as it may seem. It is *true* that "a threat that would be sufficiently imminent to justify killing a person in self-defense could nevertheless be insufficiently imminent or certain to qualify as a 'threat of imminent death' under the torture statute." *Id.* Put another way, there could be a terrorist threat that is not so immediate as to constitute a "threat of imminent death" to its intended victims (and thereby potentially cause severe mental pain), but the nature of the threat is such that the only chance to stop it is to acquire information from a detainee immediately.

Judge Bybee to second-guess the CIA's factual representations on the SERE program (including sleep deprivation and stress positions) despite explicit warnings—which the CIA understood—that OLC's advice was dependent upon the accuracy of the information provided. [redacted]

OPR not only fails to cite any contemporaneous objections, it also fails to cite any criticisms of the Classified Bybee Memo by the OLC lawyers who subsequently reviewed the issues. OPR "found the withdrawal of certain arguments and conclusions of law by the Department to be significant." *Id.* at 159. Yet OPR does not find it "significant" that those very same lawyers declined to withdraw the Classified Bybee Memo even in the aftermath of substantial public criticism of the interrogation program. Similarly, OPR trumpets the views of Goldsmith, Levin, and Bradbury when discussing the Bybee Memo, but when it comes time to critique the Classified Bybee Memo (*id.* at 234-37), OPR is utterly mute about their views. Little wonder. Levin and Bradbury affirmatively advised the CIA that they concurred in the view that every one of the techniques at issue did not constitute torture under the Act. Goldsmith, in light of the CIA IG Report, asked the CIA to abide by the "assumptions and limitations set forth in the Classified Bybee Memo," but otherwise approved nine of the ten EITs and recommended that use of the waterboard be suspended only on a temporary basis.[133] *Id.* at 115. And Goldsmith told OPR that he viewed the Classified Bybee Memo as "hyper narrow and cautious and splitting hairs and not going one millimeter more than you needed to answer the question." *Id.* at 122. OPR gives no persuasive basis for refusing to embrace that conclusion.

1. The Failure to Discuss Military Prosecutions for the Use of Water Torture Was Not Even Negligent

OPR asserts that a review of U.S. legal history would have revealed that the United States "has historically condemned the use of various forms of water torture and has punished those who applied it."[134] Report at 234. OPR concedes that its handful of examples did not arise under laws using the statutory definitions at issue and that they lack adequate factual descriptions, but nevertheless suggests that a "thorough and balanced examination of the technique of waterboarding" would have included them. *Id.* at 235. This conclusion is unfounded for several reasons.

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[133] As explained *supra* Section II.F, Goldsmith's decision to temporarily suspend the use of waterboarding was based on his concern that the CIA's "actual practice may not have been congruent with all of [the] assumptions and limitations" in the Classified Bybee Memo. Jack Goldsmith, Letter to Scott Muller (May 27, 2004). Goldsmith did not say that he had concerns about the legal analysis in that memo. *Id.* Indeed, Goldsmith supervised the initial revisions of a replacement for the Yoo Memo, a draft of which concluded that all of the techniques "are fully consistent with all treaty obligations of the United States, including the Geneva Conventions and the CAT." Report at 120 (citing June 24, 2004 draft at 37 n.38).

[134] It is worth noting at the outset that even today there is no consensus that the limited form of waterboarding authorized for use on Abu Zubaydah constitutes torture. *Compare The Nomination of Eric Holder to be Attorney General in the Obama Administration: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 12 (2009) ("[W]aterboarding is torture") (testimony of Eric Holder), *with* DOJ Hearing, Part V at 43 ("I believe that a report of waterboarding would be serious, but I do not believe it would define torture.") (Statement of John Ashcroft) *and Confirmation Hearing on the Nomination of Michael B. Mukasey to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 101 (2007) (declining to say whether waterboarding is torture without additional facts). *See also* Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, Wash. Post, Dec. 9, 2007 (reporting that the CIA gave approximately thirty briefings to members of Congress on interrogation techniques, including waterboarding, and "[w]ith one known exception, no formal objections were raised by the lawmakers briefed"); Interview by Greta Van Susteren with Sen. Joe Lieberman, *On the Record: A Bad Idea* (Fox News television broadcast Apr. 21, 2009) (transcript available at

First, OPR has no answer to the point made in Judge Bybee's initial classified response that as head of OLC "it was reasonable for him, as Attorney General John Ashcroft did in turn, to rely on the work of his extremely experienced staff: [redacted] John Yoo, and Patrick Philbin." Bybee Classified Response at 4. None of those extremely experienced attorneys uncovered the obscure historical examples OPR references, and without pre-existing knowledge there would be no reason for Judge Bybee to suspect that such legal precedent existed.[135] OPR likewise ignores the argument that discovering such cases was complicated by the use of different terminology to describe the techniques at issue. *Id.* at 7. Until fairly recently, the term "waterboard" existed exclusively in classified materials. A search of the term "waterboard" within federal case law, in fact, yields only one result prior to 2002: *Int'l Bank of Commerce v. Union Nat'l Bank*, 653 S.W.2d 539, 541, 543 (Tex. Ct. App. 1983), a contract dispute case where one of the individuals involved was "an officer of the Waterboard"—the Board of Trustees of a company called Laredo Water.

The difficulty of uncovering the legal history cited by OPR is compounded by the fact that the alternative term "water torture" generally describes a completely different form of coercion. *See, e.g.*, *Jones v. Wittenberg*, 323 F. Supp. 93, 99 (N.D. Ohio 1971) ("The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel."); *Mullins v. Mullins*, 485 P.2d 663, 663 (Utah 1971) ("The deluge of questionable reading material in this case suggests a similarity to the Chinese water torture ...."); *Gorman v. Sabo*, 122 A.2d 475, 477 (Md. 1956) ("A musical instrument played loud and long enough has been held to be a nuisance comparable to the water torture of the Chinese."). Use of the term "water cure" is also subject to confusion. As the Supreme Court has observed, the "water cure" was once an ancient treatment for mental illness involving dousing and dunking of the patient. *See Robinson v. California*, 370 U.S. 660, 669 (1962); *see also Brown v. Watson*, 156 So. 327, 330 (Fla. 1934) (describing water cures as a cosmetic technique of beauty specialists); *Ill. Cent. R.R. Co. v. Sutton*, 53 Ill. 397, 400 (1870) (describing a "water cure" establishment as a place for the treatment of disease). OPR ignores these distinctions and simply "disagree[s]" with the notion that an OLC attorney might fail to successfully navigate the

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http://www.foxnews.com/story/0,2933,517260,00.html) ("I take a minority position on [waterboarding]. Most people think it's definitely torture. The truth is, it has mostly a psychological impact on people."). Congress itself refused to pass an amendment that would have made waterboarding a punishable offense under common Article 3 of the Geneva Conventions. *See* 152 Cong. Rec. S10378, S10398 (daily ed. Sept. 28, 2006) (Amendment No. 5088 to Senate bill 3930 offered by Senator Kennedy and defeated 46-53).

[135] Nor did the CIA inform Judge Bybee that the U.S. military had historically condemned this interrogation technique as torture—a fact he would expect to be told if it were true. To the contrary, Judge Bybee was instead told that our military had used waterboarding as part of its SERE training for thousands of our own military personnel and continued to do so. Classified Bybee Memo at 6. *See also* Bradbury Techniques Memo at 13 (noting that waterboarding had been used "many thousands of times" in SERE training). It stands to reason that if the technique is allowable in the U.S. military, it does not constitute torture. Although Judge Bybee was unaware of any relevant legal history at the time, he would have included it in the Classified Bybee Memo even though it was by no means ethically required. As OPR concedes, the history it relies upon had no precedential weight. Report at 235.

complex etymology of the practice and discover that the "water cure" is another name for a crude form of waterboarding. Report at 237 n.195.

Significantly, Judge Bybee and his staff were not alone in overlooking variants of waterboarding that bore different names and were used as long as century ago. There is certainly no discussion of this military history in the memos that Levin and Bradbury provided to the CIA in support of their conclusion that waterboarding did not violate the anti-torture statute. There is also no mention of such history in the Beaver Memo referenced by OPR (Report at 74), which considered the legality of waterboarding as well as a range of other techniques in a legal brief drafted for a DOD Joint Task Force at Guantanamo Bay. *See* Memorandum for Commander, Joint Task Force 170, from Diane E. Beaver, *Re: Legal Brief on Proposed Counter-Resistance Strategies* 6 (Oct. 11, 2002) ("Beaver Memo") (Appendix 16), *available at* http://www.usdoj.gov/olc/docs/memo-muller2004.pdf. Yet OPR does not suggest that any of these attorneys engaged in misconduct by failing to discover or discuss this history. In fact, the 2007 article that OPR relies upon to document its historical record of supposedly similar practices proves just how obscure this history was. The author notes that there had been a "good deal" of discussion of water torture within the legal and academic community after the interrogation policy became public in 2004, but that *as of 2007* "[t]here ha[d] been *no mention* … of past American government pursuit and prosecution of individuals who inflicted such treatment on U.S. military personnel." Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in United States Courts*, 45 Colum. J. Transnat'l L. 468, 472 n.18 (2007); *see also* Scott Shane & Mark Mazzetti, *In Adopting Harsh Tactics, No Inquiry Into Their Past Use*, N.Y. Times, Apr. 22, 2009 ("[N]o one involved—not the top two C.I.A. officials who were pushing the program, not the senior aides to President George W. Bush, not the leaders of the Senate and House Intelligence Committees—investigated the gruesome origins of the techniques they were approving with little debate."). Tellingly, in 2005 OPR did not refer to any of the legal history mentioned in its report when it questioned Judge Bybee extensively on topics relating to the adequacy of OLC's research. OPR does not even contend that its staff was aware of this authority prior to reading Wallach's article in 2007. Thus, if Judge Bybee is responsible for failing to unearth this legal history (even though he had no responsibility for original research), he shares that distinction with numerous other government lawyers, the academics cited in Wallach's article, and apparently OPR itself.

Second, OPR asserts that the Classified Bybee Memo "did not consider" the legal history of waterboarding (Report at 234), but the Bybee Memo, which was repeatedly cross-referenced, did include the most relevant legal history. The Bybee Memo explained that the TVPA "contains a definition similar in some key respects to the one set forth in Section 2340" and that it had "set forth in the attached appendix the circumstances in which courts have determined that the plaintiff has suffered torture." Bybee Memo at 24. That appendix (*id.* at 48-49) included a detailed discussion of the fact patterns presented in 13 cases, including *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996)—one of the cases that OPR identifies as relevant history that was supposedly omitted. Report at 235.[136]

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[136] OPR cites to the district court opinion, *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 910 F. Supp. 1460 (D. Hawaii 1995), but it is the same case.

OPR nonetheless concludes that this reference to *Hilao* was deficient because it "do[es] not agree that listing a case in the Appendix without discussion satisfied the attorneys' professional obligations in this matter." *Id.* at 237 n.195. But OLC certainly did include a "discussion" of the case. The memo devotes 16 lines of text to its detailed recitation of the facts and explains that the guards "poured water down [plaintiff's] nostrils ... for six hours," while threatening him with "death and electric shock." Bybee Memo at 48-49. In light of the fact that the CIA was not proposing to use a remotely similar technique, there was certainly no need to highlight this decision in the Classified Bybee Memo. Thus, the fact that the district court decision, which is referenced in the Ninth Circuit's opinion, described this "water cure" as a "form[] of torture" should not have been cause for alarm. Report at 235.[137] Indeed, the Bradbury Techniques Memo later explained that there were "*obvious differences* between the technique in *Hilao* and the CIA's use of the waterboard subject to the careful limits described" and that "the court reached no conclusion that the technique by itself constituted torture." Bradbury Techniques Memo at 44 n.57. There was accordingly nothing inappropriate about placing the discussion in an appendix that was used to catalogue a substantial group of decisions. *See supra* Section IV.D (including examples of the Supreme Court's use of appendices to list relevant case law). And the decision hardly supports OPR's bald assertion that "[t]he general view that waterboarding is torture has ... been adopted in the United States judicial system." Report at 235.

Third, OPR's own descriptions of the historical examples at issue demonstrate just how far removed they are from the question posed by the CIA. Report at 234 & nn.192, 193. As OPR concedes, the military prosecutions it identifies arose under different laws that did not "involve[] the interpretation of the specific elements of the torture statute." *Id.* at 235. Nor could OPR actually conclude that the conduct at issue was "similar [to] the techniques ... proposed by the CIA." *Id.* To the contrary, the descriptions in the historical record show that they were in fact very, very different. The inclusion of this information was by no means essential to the delivery of ethical legal advice.

OPR nonetheless claims that it was essential for OLC to discuss the convictions of Japanese soldiers after World War II for use of "water torture." *Id.* at 234. Those prosecutions, however, were based on violations of "the Laws and Customs of War," which at the time prohibited conduct far beyond the acts of torture proscribed by the statute at issue here. Such laws, for instance, included a mandate that prisoners of war shall "at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity." *See, e.g.*, Convention of July 27, 1929 Relative to the Treatment of Prisoners of War, art. 2, 47 Stat. 2021, 2031. In addition, while many of the specifications against the Japanese soldiers referenced brutal mistreatment and torture, including acts that used water to cause fear of drowning, the description of those techniques leave no doubt that they used water in a manner that inflicted serious physical pain and combined it with a range of violent acts. *See* Report at 234 n.192 ("As the interrogation continued, he would be beaten and water poured down his throat 'until he could hold no more.'"; "[T]he subject was tied lengthways on a ladder, face upwards. He was then slipped into a tub of water and held there until 'almost drowned.'") (citations omitted). *See also* Wallach, *Drop by Drop* at 484-89 & nn.73-76, 91 (specifications stated that defendants variously beat their prisoners, poured water into their mouths and nostrils, pressed lighted cigarettes against their bodies, forced them into a tank of water, and made them ingest a bucketful of sea water); Judgment of the International Military Tribunal for the Far East, Ch. VIII, *available at* http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html, at 1059 (defining the "water treatment" as follows: "[t]he victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was then to revive the victim and successively repeat the process.").

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[137] The district court opinion featured by OPR (Report at 235) merely resolved a procedural question concerning the use of sampling to determine class compensatory damages. *In re Estate of Ferdinand E. Marcos*, 910 F. Supp. at 1464. The court's summary reference to the "water cure" was part of a list of fourteen human rights violations various plaintiffs experienced that the court described in passing as "forms of torture." *Id.* at 1463.

OPR also relies on the omission of the history of the "water cure" during the U.S. occupation of the Philippines following the Spanish-American War. Report at 234. Yet OPR acknowledges that the officer who was convicted for use of the "water cure" was "tried for conduct to the prejudice of good order and military discipline," which in no way illuminates the proper interpretation of the torture statute. *Id.* at 235 n.193. Moreover, the "water cure" was a far cry from the technique proposed by the CIA. U.S. Army Major Edwin Glenn was convicted based on use of a process whereby a "faucet was opened and a stream of water was forced or allowed to run down [the prisoner's] throat" and "[w]hen he was filled with water it was forced out of him by pressing a foot on his stomach or else with the hands." Wallach, *Drop by Drop* at 499-500 & nn.141, 144. *See also* Guénaël Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Case Law on War Crimes*, 1 J. Int'l Crim. Just. 135, 143 (2003) (describing the water cure technique, as practiced by Major Glenn, as "consist[ing] in forcing large quantities of water (sometimes salted water) into the mouth and nose of a victim as a result of which his or her stomach would inflate causing great pain and, eventually, suffocation").

Finally, OPR's claim that OLC was required to discuss *United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984), which supposedly "adopted" the "general view that waterboarding is torture" is equally unfounded. Report at 235. The decision affirmed the conviction of a Texas sheriff and two deputies for civil rights abuses inflicted in the course of extracting confessions. The opinion includes a reference to the fact that the defendants used "water torture" as part of their abusive course of conduct. *Id.* Yet even OPR acknowledges in a footnote that "[t]he court did not describe what constituted the 'water torture.'" *Id.* at 235 n.194. As the discussion of the military history demonstrates, water can and has historically been used in ways that inflict severe physical pain. There is accordingly no reason to leap to the conclusion that *Lee's* unexplained reference to "water torture" reflects the judiciary's "adopt[ion]" of the "view that waterboarding is torture." *Id.* at 235. Moreover, the Fifth Circuit had no occasion to consider the legal meaning of "torture" in any event. Civil rights abuse claims do not require proof of torture. As former Attorney General Mukasey told the Senate Judiciary Committee on July 9, 2008, it is doubtful that the *Lee* case belonged in the Classified Bybee Memo because it "was not a case that dealt with whether a technique is or isn't torture under the torture statutes." *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Michael Mukasey). *See also* Daphne Eviatar, *Torture By Any Other Name*, The Washington Independent, Oct. 17, 2008 (quoting a Justice Department spokesman that the *Lee* prosecution was "fully consistent with the legal advice OLC provided to the CIA"). The court's unexplained and colloquial use of the term "water torture" carries no legal significance whatsoever. OPR is grasping at straws.

2. The Classified Bybee Memo Properly Relied on Evidence That the CIA Psychologists Derived From SERE Training

OPR claims that the Classified Bybee Memo erred by relying "almost exclusively" on data and reports derived from the SERE training of U.S. military personnel. Report at 235. According to OPR, that was inappropriate because OLC failed to address possible differences in the impact of these techniques on hardened terrorists like Abu Zubaydah and SERE trainees. *Id.* at 235-36. OPR's analysis ignores the facts and contravenes the governing rules of ethics.

First, although OPR has compromised Judge Bybee's ability to respond to this allegation by denying him access to the CIA documents at issue, the Classified Bybee Memo on its face indicates that OLC's advice was not based "almost exclusively" on SERE training. The Classified Bybee Memo states, for instance, that the CIA "reviewed the relevant literature" and consulted "with a number of mental health experts" and "outside psychologists." Classified Bybee Memo at 6. Notably, the memo contrasts "studies of lengthy sleep deprivation" with results of the technique's use "in military training." *Id.* at 6. These examples, and perhaps many more of which we are unaware, all demonstrate that the factual investigation conducted by the CIA, and relied upon by OLC, went beyond SERE training.

Second, even if the Classified Bybee Memo relied "almost exclusively" on data derived from SERE training, this would not constitute misconduct. As a practical matter, OLC's advice depended on the facts provided to it by the CIA, with the understanding that the CIA "d[id] not have any facts in [its] possession contrary to the facts outlined" in the Classified Bybee Memo. *Id.* at 1. It would therefore have been wholly inappropriate for OLC lawyers to substitute their understanding of the facts and presume greater knowledge about the psychological effects of interrogation than CIA experts who had studied the issues extensively. As a legal matter, OLC was "'entitled to rely in good faith upon the statement of facts made to him by [the CIA]'" and was "'not under a duty to institute an inquiry for the purpose of verifying [its] statement[s] before giving advice thereon.'" *Meiksin v. Howard Hanna Co.*, 590 A.2d 1303, 1306 (Pa. Super. Ct. 1991) (citation omitted). *See also Kent v. State*, 699 S.W.2d 767, 768 (Mo. Ct. App. 1985) ("'In the preparation of a case a lawyer is not required to be clairvoyant, and he must of necessity rely on information furnished him by his client.'") (citation omitted). Yet OPR faults OLC for failing to second guess multiple expert opinions that the interrogation techniques would not cause long-term harm.

Third, the information available did not provide OLC with cause to doubt the soundness of the CIA's determination that it could rely on data and reports derived from SERE training. The Classified Bybee Memo explicitly proceeded on the premise that the CIA would be using the "same techniques" that "have been used and continue to be used" in the SERE program. Classified Bybee Memo at 4, 17 ("You have informed us that your proposed interrogation methods have been used and continue to be used in SERE training."). OPR nevertheless seems to believe that it was obvious that these training interrogations could not provide reliable information about the pain that would result because the CIA's interrogation program was not "identical to what a SERE trainee would experience." Report at 55. But the CIA represented to OLC that the SERE techniques were "not used one by one in isolation, but as a full course of conduct *to resemble a real interrogation.*" Classified Bybee Memo at 17; *see also* Jack Goldsmith, Letter to Scott Muller (May 27, 2004) ("As you know, the use of the waterboard in SERE training was a significant factor in this Office's legal analysis."). Consequently, it was OLC's understanding that "the information derived from SERE training bears both upon the impact of the use of the individual techniques and upon their use as a course of conduct." Classified Bybee Memo at 17. And OPR's own report concedes that the interrogation techniques were "similar to" the SERE techniques, which included "slapping, shaking, stress positions, isolation, forced nudity, body cavity searches, sleep deprivation, exposure to extreme heat or cold, confinement in cramped spaces, dietary manipulation, and waterboarding." Report at 34. Indeed, OLC continued to credit the relevance of this experience even after the issue was subjected to further study in the aftermath of the CIA IG investigation. The Bradbury Techniques Memo (at 6) observed that "[i]ndividuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation," yet went on to reach virtually the same conclusions regarding the techniques at issue.

OPR never offers any reason why the SERE experience was not directly relevant to the CIA's assessment of the potential for severe *physical* pain. The CIA never provided any information, and OPR cites none, suggesting that Abu Zubaydah's physical response to the techniques would be any different than the response of the SERE trainees. A facial slap does not hurt more when it is administered by the enemy. The same is true for the waterboard. That technique produces "an automatic physiological sensation" of drowning even when the individual knows for certain that the interrogators are not going to drown him. Classified Bybee Memo at 4.

Moreover, the CIA also provided facts supporting its view that the SERE exercises produced levels of *fear* commensurate with enemy interrogations—which demonstrated the relevance of SERE training to the potential for severe mental pain or suffering. It explained that use of the waterboard had been "almost 100 percent effective in producing cooperation among the trainees" despite their knowledge that it was just a training exercise. *Id.* at 6. That statistic can only be explained by the authenticity of the training. The training induced a "real" fear of death among trainees, yet the due diligence provided by the CIA included a report from a "psychologist who served in the Air Force's SERE training program" confirming that the "long-term psychological effects of [waterboard] use were minimal." Report at 56.

In addition, the CIA emphasized that it would follow numerous precautionary measures similar to those used in the SERE program in order to ensure the safety and health of the person subjected to interrogation. Along with other restrictions, the Classified Bybee Memo required the presence of "a medical expert with SERE experience" throughout use of the waterboard and that "the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm to Zubaydah." Classified Bybee Memo at 4. OLC was also assured that the interrogation phase would likely last no more than "several days" and in any event would not exceed thirty days. *Id.* at 1.[138] [redacted]

[redacted]

[redacted]

[redacted] There is absolutely no evidence, however, that Judge Bybee was even aware of the concept of "learned helplessness." Judge Bybee told OPR that he could not recall reviewing any written material from the CIA regarding the techniques. Bybee Tr. at 44. Judge Bybee later reiterated that he "had very little interaction with the CIA," and that most contact would have been through Yoo. *Id.* at 111.

[redacted]

In any event, the July 24, 2002 fax sent by the CIA to Yoo and [redacted] that OPR relies upon (Report at 235-36) by no means established that the potential for "learned helplessness" made the CIA's reliance on the SERE experience improper even for an assessment of mental pain, let alone physical pain. [redacted] the CIA still represented to OLC that the information it gathered from all relevant sources as well as the "psychological assessment" of Zubaydah led it to conclude that "the use of the procedures, including the waterboard, and as a course of conduct would not result in prolonged mental harm." Classified Bybee Memo at 18. [redacted] but never retracted its good faith view that the SERE experiences were a highly relevant benchmark and that the techniques would not cause severe physical pain or prolonged mental

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[139] Confusion on this score exists due to uncertainty regarding CIA terminology. A CIA official explained that the 83 times referred to the number of "short pours" of water involved in five sessions of waterboarding. Joseph Abrams, *Despite Reports, Khalid Sheikh Mohammed Was Not Waterboarded 183 Times*, Fox News, Apr. 28, 2009. The CIA Inspector General confirmed this. CIA IG Report at 36 n.41 ("For the purpose of this Review, a waterboard application constituted each discrete instance in which water was applied for any period of time during a session."). The absurd consequences of this calculation method are shown by the number of times the CIA could have "waterboarded" a detainee pursuant to Levin's August 2, 2004 authorization letter. [redacted]

harm. *Id.* The CIA's acknowledgement of "some level of risk" does not change the legal analysis. The statute only requires a good faith belief, not certainty.

Moreover, OPR simply ignores the fact that the CIA provided *other* information supporting its conclusion that "learned helplessness" would not cause "severe mental pain or suffering" within the meaning of the statute. This other information made the potential difference in the psychological impact on SERE trainees and enemy combatants utterly immaterial to the legal analysis. There was no evidence that "learned helplessness," which reportedly "creates a psychological dependence and instills a sense that, because resistance is futile, cooperation is inevitable," rose to the level of severe mental pain even on a temporary basis. Report at 40. Even if it did, the available information indicated that it would not cause "prolonged mental harm" as required by the statutory definition. [redacted] *Id.* at 42. In light of the 30-day limitation on the interrogation period, there was good reason to accept the CIA's conclusion that use of the procedures, even in combination, "would not result in prolonged mental harm."[140] Classified Bybee Memo at 18. As the Bybee Memo explained (at 29), the European Court of Human Rights held in *Ireland v. the United Kingdom*, 25 Eur. Ct. H.R. (sec. A) (1978) that a course of techniques that caused detainees "psychiatric disturbances during interrogation," that could "break[] their physical and moral resistance," did not constitute torture. OPR simply declines to respond to any of this evidence, which was set forth in Judge Bybee's initial classified response. Bybee Classified Response at 10. It obviously has no answer because there is none.

At bottom, OLC was not ethically required to reject the CIA's reasonable inference that the SERE data was relevant to its assessment of the potential for severe pain because enemy combatants were more likely to develop a temporary psychological condition that would not meet the statutory definition of mental pain in any event. OLC was fully entitled to rely on the CIA's representation that it did "not have any facts in [its] possession contrary to the facts outlined [in the Classified Bybee Memo]." Classified Bybee Memo at 1. It is simply not OLC's role to substitute OPR's intuition for the CIA's expert findings, and it would be unreasonable to expect OLC to discuss and resolve every possible difference between SERE training and CIA interrogations in a memorandum written under exigent circumstances. OLC was entitled, as it made clear on the first page of the Classified Bybee Memo, to give advice based on the facts provided to it.

3. Analysis of Sleep Deprivation and Stress Positions

OPR determined that the Classified Bybee Memo failed to provide a "thorough, objective, and candid analysis" in concluding that sleep deprivation and stress positions would not result in severe physical pain or suffering because OLC did not "inquir[e] … how the subject would be kept awake" or "how prisoners would be forced to maintain stress positions." Report at 236. OPR criticizes OLC for failing to consider whether "subjects would be shackled, threatened, or beaten by the interrogators." *Id.* at 237. This is nonsense. OLC was entitled to rely on the view that the CIA was disclosing the relevant information.

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[140] The Bradbury Techniques Memo confirmed that despite the CIA's use of the waterboard "on three high level al Qaeda detainees, two of whom were subjected to the technique numerous times, … none of these three individuals has shown any evidence of physical pain or suffering or mental harm in the more than 25 months since the technique was used on them." Bradbury Techniques Memo at 15.

The CIA informed OLC that these "same techniques" were being used on our own SERE trainees without infliction of severe pain. Classified Bybee Memo at 4. The memo also details OLC's "understand[ing]" of each of the techniques "[b]ased on the facts [the CIA] ha[d] given," and cautioned the CIA on both the first and last pages of the memo that its conclusions were "based on" and "limited to" those facts. *Id.* at 1, 2, 18. OLC added that "[i]f these facts were to change, [its] advice would not necessarily apply." *Id.* at 1. [redacted] OLC accordingly had no responsibility to opine on an endless variety of undisclosed ways that the CIA might try to keep a detainee awake or in a stress position. The SERE experience was enough to suggest that they could be used without severe pain. And the CIA had its own experience with these interrogation methods as well. *See* William Ranney Levi, *Interrogation's Law*, 118 Yale L.J. 1434, 1480 (2009) ("At least until 1988, the CIA interpreted the law to allow stress positions ..., disrupted sleep, solitary confinement, sensory deprivation, threats of violence, examination of body cavities, and temperature manipulation.").[142]

There was no reason for OLC to conclude that the CIA was hiding the relevant facts. The CIA had a general responsibility to follow OLC's legal advice in good faith, and could not escape application of the anti-torture statute by devising ways to inflict severe pain that had not be disclosed to OLC. Indeed, it was in the CIA's interest to share as much information as possible. Otherwise its activities would fall outside the express scope of OLC's opinion. If a particular means of achieving sleep deprivation constitutes torture, the Classified Bybee Memo would not protect the CIA interrogators who employed it. By OPR's logic, CIA interrogators who gave detainees repeated electric shocks to keep them awake would be immunized under OLC's Classified Bybee Memo, even though the Bybee Memo repeatedly described electric shock as a form of torture. Bybee Memo at 16, 20 nn.10, 24. To the contrary, it is reasonable to assume OLC's advice included restrictions on the range of activities available to the CIA. OPR offers no support for a contrary conclusion.

[redacted]

[redacted]

[142] OPR is flat wrong to assert that the CIA "had no institutional experience or expertise" regarding interrogations prior to September 11, 2001. Report at 31. Along with the Levi article referenced above and the McCoy volume cited by OPR itself, Report at 31 n.30, the CIA Inspector General noted that "[t]he Agency has had intermittent involvement in the interrogation of individuals whose interests are opposed to those of the United States," dating back to before the Vietnam War. CIA IG Report at 9. Notably, OLC only authorized a more restrictive version of sleep deprivation and stress positions than what the U.S. military had employed in the past. Levi, *Interrogation's Law*, 118 Yale L.J. at 1440 ("Several techniques (for example, sleep deprivation, and standing as a stress position) that were understood at times before 9/11 as lawful by the military for use on protected prisoners of war were more coercive by degree than the same techniques authorized for use on unlawful combatants post-9/11.").

[redacted]

OPR also faults OLC for neglecting to disclose that a 1930 Bar Association report, cited in a footnote of a Supreme Court case from 1944, supposedly condemned sleep deprivation as "torture." Report at 236 (citing *Ashcraft v. Tennessee*, 322 U.S. 143, 150 n.6 (1944)). This was not cited in the Bradbury Techniques Memo either because it was not remotely relevant. Both *Ashcraft* and the accompanying Bar Association report concerned the admissibility of coerced confessions, not the definition of torture. They referred to "torture" in a colloquial sense and made no finding that the interrogators should be liable. In fact, the only case of which we are aware that assessed whether sleep deprivation constituted torture under a human rights convention—and which, notably, OPR failed to reference in this section—held that it did not. *See Filartiga v. Pena-Irala*, 630 F.2d at 885 n.2 (noting that in *Ireland v. United Kingdom*, the European Court of Human Rights held "that Britain's subjection of prisoners to sleep deprivation ... was 'inhuman and degrading,' but not 'torture' within the meaning of the European Convention on Human Rights"). Since the Classified Bybee Memo, moreover, the U.S. government has affirmed the use of sleep deprivation on multiple occasions. *See* Department of Defense, Working Group Report at 65, 70 (April 4, 2003); Jack Goldsmith, [redacted] John Ashcroft, Letter to John McLaughlin (July 22, 2004) (confirming that [redacted] complied with U.S. law); Bradbury Techniques Memo at 40 ("[W]e conclude that the authorized use of sleep deprivation by adequately trained interrogators, subject to the limitations and monitoring in place, could not reasonably be considered specifically intended to cause severe mental pain or suffering.").

Second, OPR offers no reason why OLC should have assumed that the CIA would use shackling and beatings to "ensure that [the enemy combatants] maintained those positions." Report at 237. To the contrary, the Classified Bybee Memo included an explicit understanding that "there is no aspect of violence" to either stress positions or wall standing. Classified Bybee Memo at 13. Both positions would be "used only to induce temporary muscle fatigue," *id.* at 9, casting doubt on the use of methods to sustain the stress positions for extended periods of time. The Classified Bybee Memo likewise states that any repetition of the techniques "will not be substantial" (*id.* at 2), indicating the expected constrained use of stress positions. A fair presumption, then, is that the CIA had certain non-violent means (or was limited to the use of non-violent means) for sustaining the stress positions. *See also* Bradbury Techniques Memo at 33, 34 (noting that the techniques are "self-limited by the individual detainee's ability to sustain the position," suggesting a limited role on the part of the interrogator.) This was certainly the same presumption underlying the Beaver Memo when it concluded that "the use of stress positions such as the proposed standing for four hours ... [is] legally permissible so long as no severe physical pain is inflicted and prolonged mental harm intended." Beaver Memo at 6. In any case, the explicit assumptions set forth in the Classified Bybee Memo made it reasonable for Judge Bybee to conclude that any methods employed by the CIA would not involve severe pain or suffering.

I. OPR's Laundry List of Supposed Errors and Omissions Falls Far Short of Violating Any Rule of Professional Conduct

As detailed above, OPR spends nearly one hundred pages dissecting every last phrase and footnote of the Bybee Memos, critiquing even what it admits to be "relatively minor omission[s]." Report at 187. Taken as a whole, OPR's petty criticisms amount to a comedy of "errors." OPR seeks to justify its microscopic approach on the basis that "[a]lthough some ... flaws were more serious than others, ... their cumulative effect compromised the thoroughness, objectivity, and candor of OLC's legal advice." Report at 159-60. This kitchen sink strategy, however, assumes that OPR's individual allegations have adequate merit to accumulate beyond a de minimus level. They do not. It likewise assumes that what errors do exist are attributable to Judge Bybee. They are not. OPR somehow thinks that selectively citing a handful of critical remarks from DOJ officials (*id.* at 160) will substantiate its claim. In fact, none of these officials shares OPR's view that the memos violated professional standards of candor or competence. Moreover, legal ethics experts, including two of the leading scholars in the field, confirm that Judge Bybee acted in accordance with relevant rules of conduct. As Professor Geoffrey Hazard concluded: "Discipline could not properly be imposed on Judge Bybee under the D.C. Rules of Professional Conduct or elsewhere." Hazard Letter ¶ 2. Even the undisputed facts establish that the memos were prepared in conformity with the relevant D.C. rules—Rule 1.1's duty of competence, Rule 1.4(b)'s duty of communication, and Rule 2.1's duty of candor.

First, most of OPR's claims, regardless of their underlying merit, are not attributable to Judge Bybee. The undisputed facts, *see supra* Section II, show that Judge Bybee carried out his Rule 1.1 responsibilities as supervisor with care, working diligently up until the last moments before the CIA deadline. Yet OPR insists on including a slew of picayune citation complaints against Judge Bybee even while acknowledging that he "should not be held responsible for checking the accuracy and completeness of every citation, case summary, or argument." Report at 255. OPR attempts to square this circle by finding Judge Bybee responsible for "problems ... that were brought to his attention by others" (*id.* at 255), but neglects to mention that the only concerns brought to Judge Bybee's attention were by Patrick Philbin on the evening the opinions were signed. And OPR concedes that Philbin did not regard those concerns to be significant enough to warrant delaying the memos. *Id.* at 63.

Second, several leading ethics experts firmly reject OPR's conclusions. Contrary to OPR's assertions regarding the Bybee Memos' lack of thoroughness, Hazard noted that "[t]he opinions at issue are extensive, detailed, careful and sober." Hazard Letter ¶ 4. Indeed, Hazard found the analysis "fulsome to the point of being tedious." *Id.* Contrary to OPR's obsession with the omission of counterarguments, Hazard emphasized that "*[a]n opinion is not required to embrace all possibilities and qualifications, nor include a brief for the opposing view.*" *Id.* ¶ 11. Hazard explained that "the CIA already knew from its own study that there were risks and uncertainties" such that "Judge Bybee did not have to tell them anything more about risks or counter-arguments." *Id.* ¶ 15. And contrary to OPR's expansive vision of D.C. Rule 2.1, Hazard clarified that the "critical concept" underlying the duty of candor is the lawyer's "honest assessment," which OPR never even challenges. *Id.* Hazard also rejected OPR's vision of "independence" and noted that independent judgment "is not compromised by the lawyer's awareness of the result desired by the client," given that "[m]ost legal advice" involves a "course of action the client hopes to pursue." *Id.* ¶ 16. Ultimately, Hazard recognized that "[t]here may have been some errors in the analysis in route to reaching plausible conclusions on unsettled questions; the memos may have included some unnecessary discussion of possible defenses; and they may include some ambiguous sentences that could possibly be misinterpreted," but "[i]n [his] opinion, these do not constitute serious deficiencies." *Id.* ¶ 18. After reviewing the memos, Professor Hazard concluded that "there is no basis for charging Judge Bybee with failure to conform to recognized standards of professional conduct." *Id.*

Ronald Rotunda, a Distinguished Professor of Jurisprudence at Chapman University, reached similar conclusions. Rotunda noted that D.C. Rule 1.1 requires a "serious deficiency" in representation. Letter from Ronald D. Rotunda to Miguel Estrada 3 (Oct. 7, 2009) ("Rotunda Letter") (Appendix 5). There was "no evidence" of such incompetence, in Rotunda's view, largely because the arguments put forward in the Bybee Memos were eventually vindicated in cases like *Price* and *Pierre*, and even cited by the Department of Justice. *Id.* Rotunda also confirmed that an attorney cannot violate D.C. Rule 2.1 "so long as he gives his 'honest assessment.'" *Id.* (quoting Rule 2.1 cmt. [1]). In addition, Rotunda noted that "[t]here is no basis in the law of professional responsibility to apply ad-hoc 'best practices' standards developed *after the fact* to find a lawyer guilty of professional misconduct, especially when those standards do not purport to establish minimum requirements for professional conduct under the relevant ethical rules." *Id.* at 4 (emphasis in original). Rotunda found "no basis for finding that [the Bybee Memos'] authors violated any rules of professional conduct." *Id.*

Many other experts, from across the political spectrum, have expressed the same views as Hazard and Rotunda. Alan Morrison, for example, stated that he finds the Bybee Memos "troubling" and "erroneous," but that there is no basis for bar disciplinary action because (1) there is "no such evidence" of bad faith and (2) "*there is no doubt*" that the lawyers who wrote the memos "met [the professional] requirements" of competence under Rule 1.1. Alan B. Morrison, *Alas, No Disciplinary Action*, National L. J., Aug. 17, 2009, at 38 (Appendix 7). And Stuart Taylor, known for his moderate views, stated that there is "nothing remotely" like proof that Judge Bybee was incompetent or acted in bad faith. Stuart Taylor, Jr., *Torture: Stop Harassing the Lawyers*, National Journal, Sept. 12, 2009 (Appendix 8).[143]

Third, numerous officials with knowledge of the relevant events confirm the view of these ethics experts. Timothy Flanigan, a former head of OLC, stated that "any criticisms of the [Bybee] memorandum that I have made in the past were never intended to suggest in any way that the authors of the memo committed professional misconduct." Flanigan Decl. ¶ 4. "Quite to the contrary," Flanigan continued, "based on my own personal knowledge I very strongly believe that the authors of the memo acted in a manner consistent with their professional responsibilities." *Id.* Dan Levin likewise stated that his "disagreements with aspects of the authors' analysis were not intended to suggest that [he] believed the authors committed professional misconduct." Levin Decl. ¶ 6. On those areas of disagreement, Levin added that "[r]easonable attorneys can disagree" and that "the authors might be right and I might be wrong." *Id.* ¶ 5. In his submission to OPR, former Attorney General Michael Mukasey stated that although some aspects of the Bybee Memos were "incorrect or inadequately supported," OPR was not taking into account the "real-world context" that involved "enormous time pressure" on those preparing them. Mukasey Letter at 4, 5. Mukasey ultimately warned that "the recommendation of bar referrals in the circumstances presented here is likely to have harmful consequences not only for those immediately involved, but also for the Department and ultimately for the country." *Id.* at 14.

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[143] Saul J. Singer, the Senior Legal Ethics Counsel for the D.C. Bar, has similarly stated that "there is, at the very least, a good-faith argument to be made" that waterboarding is not torture and that "even if the ultimate arbiter decides that waterboarding is torture, that does not mean that lawyers who advised to the contrary should be professionally disciplined." Saul Jay Singer, *Letter to the Editor: Don't Kill All the Lawyers*, Wash. Post, May 11, 2009 (Appendix 9).

And then there is Goldsmith. In his submission to OPR, Goldsmith stated that he "never believed ... that the analysis in these opinions implicated any professional misconduct." Goldsmith Submission at 1. Finally, there is the client representative, John Rizzo. He has expressed the view that the "OLC lawyers worked diligently on the issues, raised questions, sought out relevant factual information, and solicited input from a number of Executive Branch lawyers." Rizzo Letter ¶ 2. Rizzo believes that "the memos adequately informed [him] about the relevant risks and provided [him] with the information that [he] needed to advise the CIA." *Id.* ¶ 4. Rizzo concluded that he was "satisfied" that Judge Bybee "met the standard of care." *Id.* ¶ 6.

Yet OPR lists every one of these officials as support for its view that the Bybee Memos were "seriously deficient," noting only that they "would not necessarily agree with some of our findings in this matter." Report at 160. With respect, such an understatement is hardly a fair characterization of these officials' view on the matter. OPR seeks to issue its report despite the contrary opinions of *all* these experts and government officials. Their arguments provide no basis for doing so.

V. THE UNDISUTED FACTS ESTABLISH THAT JUDGE BYBEE PERFORMED HIS DUTIES IN CONFORMANCE WITH THE RULES OF ETHICS AND DID NOT ENGAGE IN MISCONDUCT

As set forth, OPR's analysis falls far short of establishing that the advice reflected in the Bybee Memos failed to satisfy the requisite standard of care. That is enough to end this inquiry. But even if those deficiencies were serious enough to establish that John Yoo violated his duties of competence or candor, OPR's findings against Judge Bybee still could not stand. OPR has not established that Judge Bybee engaged in intentional or reckless violations of his ethical duties, which OPR (at last) concedes is a prerequisite for a finding of misconduct under its own standards. Report at 18-19.

OPR recognizes the hurdle and concedes that Judge Bybee "did not conduct the basic research" or "draft any sections" of the memos, and did not know that the advice was "incomplete or one-sided." *Id.* at 255-56. It nonetheless concludes that he "should have known" that there was a "substantial likelihood" that the memos were not "thorough, objective, and candid" and that his decision to sign them on August 1, 2002 was "objectively unreasonable" and therefore "reckless." Report at 257. As explained in Section III, *supra*, proof of recklessness requires proof that Judge Bybee not only "acted imprudently or incompetently" by signing the memos, but that he engaged in "blatant wrongdoing ... with deliberate malice or conscious disregard of his clients' rights." *Hendry v. Pelland*, 73 F.3d 397, 400 (D.C. Cir. 1996) (denying punitive damages despite proof that the defendant violated disciplinary rules for insufficient evidence of recklessness). Or, as the OPR Analytical Framework puts it, an attorney who "makes a good faith attempt" to satisfy his ethical duties "does not commit professional misconduct." OPR Analytical Framework ¶ B(4). The undisputed facts foreclose any finding of recklessness.

A. Judge Bybee Did Not Violate His Duty of Candor Because He Honestly Believed The Advice, As OPR Concedes

Judge Bybee owed his clients a duty of candor, but he satisfied it by issuing memos that reflected his "honest assessment" of the issues presented. As set forth, OPR concedes, and the evidence unquestionably establishes, that the memos reflected his good faith, honest advice. And Professor Hazard has confirmed (Hazard Letter ¶ 15) that such evidence is dispositive of the question here under the governing law. Professor Paulsen, another expert in the field of ethics, shares that view. As he recently concluded,"[i]n the absence of smoking-gun evidence that the lawyers had concluded that a proposed course of conduct was illegal, but that they then agreed to provide a 'cover' memo whose advice was contrary to that conclusion, there is no ethical problem here at all." Michael Stokes Paulsen, *Obama's Injustice Department*, The Weekly Standard (May 25, 2009). OPR, of course, found no such thing.

OPR nonetheless proceeds to find that Judge Bybee violated his duty of candor because he "should have known" that other attorneys had not prepared the memos with adequate candor. Report at 256. This is a puzzling theory. Judge Bybee signed the opinion. If it reflected his honest assessment of the issues, then it does not matter whether other attorneys also believed it was correct advice. By signing the opinion, Judge Bybee was not vouching for the views of other attorneys. He was exercising the statutory authority that had been delegated to him by the Attorney General to provide "his" own "opinion." 28 U.S.C. § 511. When he did so, he satisfied his personal duty of candor. Whether the opinion was right or wrong, it was honest, and therefore candid advice.

Even if there were some type of vicarious duty of candor of the sort OPR relies upon, it was not violated here. OPR never finds that John Yoo did not honestly believe the advice he gave, just that he knew it was "one-sided." Report at 256. For the reasons discussed, that is not a violation of the duty of "candor." Moreover, there is no evidence that Judge Bybee was ever put on notice that Yoo was violating a duty of candor even if it prohibited "one-sided" advice. OPR places substantial reliance on Patrick Philbin's discussion with Judge Bybee on the evening the opinions were signed to establish notice (*id.* at 257), but Philbin said nothing to suggest that he doubted Yoo's candor. *See supra* Section II.B. Expressing concerns that the defenses sections were "dicta" and went beyond prior opinions on Executive Power is a far cry from alerting Judge Bybee to an "obvious" and "high" risk that Yoo was violating a duty of candor.

To our knowledge, there has never been a disciplinary finding based on a violation of Rule 2.1 in the history of the D.C. Bar. This surely should not be the first.

B. The Issuance of the Memos Could Not Support a Finding of Recklessness Based on the Quality or Competence of the Analysis Because the Conclusions Were Not Unquestionably Wrong

As set forth, the issuance of the Bybee Memos did not violate the duty of care and competence imposed by Rule 1.1 and OPR never actually found that it did. But even if it had, there could be no finding of recklessness here.

As Judge Bybee demonstrated to OPR in response to the Draft Report (Bybee Draft Response at 28-29), the Supreme Court squarely held that the adoption of a plausible but erroneous interpretation of an unsettled question of law could not constitute recklessness as a matter of law. And the Court reached that determination with the express support of the United States, which appeared as an amicus to advance that view of the law governing civil recklessness. The implications of that holding for this investigation are obvious, because OPR has never contended that any of the conclusions in the Memos were unquestionably wrong (or that anyone ever alerted Judge Bybee to that possibility.) *See* Report at 160 (confirming that OPR has not evaluated whether the conclusions were correct). As a consequence, the advice at issue here was not reckless. Indeed, the judgmental immunity cases demonstrate that counsel's adoption of an opinion on an unsettled question of law has never formed the basis for liability and cannot even be negligent as a matter of law.

OPR's response to *Safeco* is damning. It does not even try to contest that application of the scienter standard used in *Safeco* would require a different outcome here. To the contrary, it says one thing, and only one thing, in response to Judge Bybee's assertion that *Safeco* forecloses any finding of recklessness against Judge Bybee. OPR merely contends that the standards for proof of scienter are not the same because the Supreme Court relied on a "willfulness" standard. *Id.* at 19 n.19. As explained (*supra* Section III), that dodge is not artful. It is patently wrong. OPR's standards require proof of recklessness and the Supreme Court has determined what recklessness means when someone adopts legal views on unsettled questions of law.

Without saying so, OPR might be trying to steer clear of the holding in *Safeco* by disclaiming any attack on the quality of the *conclusions* in the memos. *Id.* at 160. But OPR nonetheless devotes nearly 100 pages to its assessment of the quality of the analysis by identifying alleged "errors, omissions, misstatements, and illogical conclusions" (*id.* at 159), and rests its findings on a determination that the analysis was "incomplete," "one-sided," and not sufficiently "thorough." *Id.* at 258. By any name, this is an attack on the quality of the analysis, which is precisely what was at issue in *Safeco*. There the allegation was that the analysis was so bad as to be rejected by every Supreme Court justice who reached the issue. Here, the allegation is the analysis was bad but good enough to be accepted by a unanimous panel of the D.C. Circuit (*Price*) and a ten judge majority of the Third Circuit (*Pierre*). This advice obviously cannot represent a reckless departure from the standards governing competent advice.

OPR's Report represents a complete repudiation of DOJ's advocacy and the Supreme Court's holding in *Safeco*. Surely lawyers who work for insurance companies should not be entitled to greater protection from sanctions associated with the legal positions they adopt than public servants who act in good faith.

C. The Issuance of the Memos Could Not Support A Finding Of Recklessness Because Judge Bybee Did Not Disregard An Obvious and High Risk That His Decision Would Violate His Clients' Rights

While *Safeco* addresses recklessness as applied to the quality of a legal interpretation, it does not address the adequacy of counsel's communications with his client. OLC's clients did have a right to be informed in accordance with the duties imposed by Rule 1.4(b) and a reckless violation of that duty would constitute misconduct under OPR's standards. Of course OPR never addresses that theory because it never even acknowledges the existence of the rule. But no matter which ethical duty is at issue, none of the facts recited by OPR demonstrates that Judge Bybee recklessly disregarded any of his client's rights. There was no obvious, high risk that the client had not been given the information that it needed to make its decision or that the advice would be used to justify unlawful conduct, or that the analysis fell below the governing standard of care. To the contrary, no one involved at the time perceived any such risk, and precedents governing proof of recklessness utterly foreclose OPR's conclusion on the facts at issue here.

OPR relies on a sum total of three facts that it deems sufficient to support a finding of recklessness (Report at 255-57). Based on his experience and/or Philbin's statements on the evening the memos were due, Judge Bybee should have (1) recognized the "unprecedented nature" of the conclusion that "acts of outright torture could not be prosecuted" or subject to "common law defenses"; (2) questioned the "logic and utility" of relying on the medical benefits statutes; and (3) recognized the "potentially misleading nature" of statements concerning the definition of specific intent. None of those facts, considered individually or collectively, disclosed an "obvious risk that was so great as to make it highly probable" that [an ethics violation] would follow." W. Keeton *et al.*, *Prosser and Keeton on Law of Torts* § 34 at 213 (5th ed. 1984) (quoted with approval in *Safeco*, 551 U.S. at 69) or that any risk posed by issuing the memos was "objectively unreasonable under all the circumstances." Report at 256.

First, no one who reviewed the memos at the time, including Philbin, concluded that these features of the memos created a "high degree" of risk that OLC would violate its ethical duties. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Judge Bybee was aware of the extraordinary effort that had been devoted to the preparation of the memos, had reviewed the memos with care in the time available, and was entitled to rely on Yoo's acknowledged "expert[ise] in presidential war powers." Report at 256. Judge Bybee also knew that there had been extensive communications with the CIA and that no one would be under the illusion that these issues were free from doubt. Nor did Philbin express any concerns that would have required Judge Bybee to reject the views and judgment of the principal deputy who prepared the opinions. Philbin could not have advised Judge Bybee to sign the memos if he thought the memos violated OLC's ethical duties. Indeed, there were five highly-able lawyers in the room when Judge Bybee signed the memos. No one there advised him not to issue them. And many more outside the room had reviewed the memos and did not object when they were issued. *See supra* Section II.D. Any risk of an ethical violation was certainly not sufficiently "obvious" to be reckless.

Courts have repeatedly held that an individual's decision to proceed with a course of action after concerns have been raised is not reckless where, as here, experts in the field concurred in the issuance of the memos. In the vernacular of the cases, Judge Bybee was entitled to proceed because he encountered "green flags." *See, e.g., Howard v. SEC*, 376 F.3d 1136 (D.C. Cir. 2004) ("rather than red flags," the defendant "encountered green ones, as outside and inside counsel approved [the challenged] transactions"); *Ash v. McCall*, No. 17132, 2000 Del. Ch. LEXIS 144, at *29-34, *52 (Del. Ch. Sept. 15, 2000) (allegations that directors ignored "red flags" signaling accounting defects were insufficient to establish recklessness because directors relied in good faith on experts' "green flags"). In addition, the concerns that Philbin expressed fell far short of the stark warnings that are required to support an inference of recklessness. As the D.C. Circuit emphasized in *Hendry*, 73 F.3d at 400, proof that a lawyer recklessly disregarded his duties requires a showing of "blatant wrongdoing." It then held that allegations that the lawyer ignored advice when representing the client were insufficient as a matter of law. *Id*; *see also PR Diamonds v. Chandler*, 364 F.3d 671, 686-687 (6th Cir. 2004) (a defendant must ignore "*multiple*, *obvious* red flags" to support an inference of recklessness); *In re SCB Computer Technology, Inc. Securities Litig.*, 149 F.Supp.2d 334, 363 (W.D.Tenn. 2001) (granting motion to dismiss because "'red flags' must be closer to 'smoking guns' than to mere warning signs" to establish recklessness).

Second, OPR improperly refuses to consider the context in which the Bybee Memos were issued. As discussed *supra* Section II.C, Philbin explained to OPR that it would have been irresponsible to withhold the memos when the CIA was urgently waiting for authorization to proceed with the interrogation of Abu Zubaydah. And OPR's response consists of this: "situations of great stress, danger, and fear do not relieve department attorneys of their duty to provide [ethical] advice." Report at 254. In other words, OPR declines to take the deadline and the exigencies of the situation into account whatsoever. Unlike OPR, however, courts uniformly assess culpability through reference to the context in which decisions were made and require proof that the decision was "unjustifiabl[e]" in light of surrounding circumstances. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). Judge Bybee believed that the advice was sound and that the White House and the CIA were entitled to receive it by the deadline they set even if the advisory sections on possible defenses were not as refined as they could have been. Exigencies properly trump perfection.

OPR ignores all this. As Jack Goldsmith observed in his submission, OPR "is looking at the OLC opinions not in the context of threat and danger in which they were written," but rather with "'the perfect, and brutally unfair, vision of hindsight.'" Goldsmith Submission at 4 (quoting Comey). Goldsmith recounted a series of historical examples where opinions issued in times of danger were criticized in later years. He explained that these examples demonstrated why it was so essential for OPR to "exercise great caution when assessing the professional responsibility of executive branch lawyers who act in time of national security crisis." *Id.* Indeed, Goldsmith concluded that "*[i]t is especially inappropriate* ... for OPR to infer misconduct or bad faith from legal errors, even clear legal errors committed in this context." Goldsmith Submission at 4. As Goldsmith explained: "Any standard that would have landed Robert Jackson in trouble cannot be the right standard." *Id.* Yet there can be no doubt that Robert Jackson, along with a host of other distinguished Executive Branch lawyers, would surely have been in trouble under the unprecedented standards OPR adopts here. The Department should reject OPR's irresponsible conclusions.

VI. THE NUMEROUS IRREGULARITIES PERVADING OPR'S INVESTIGATION DEMONSTRATE THAT JUDGE BYBEE HAS NOT RECEIVED A FAIR HEARING

There is no way to know for sure why the OPR investigators who pursued this inquiry for the past five years have been so dead-set on finding Judge Bybee guilty of ethical misconduct. Perhaps it is due to their moral condemnation of any lawyer who would participate in the authorization of harsh interrogation techniques even within the bounds of the law. Or perhaps it is due to nothing more than a fundamental misunderstanding of the law of ethics and OPR's proper role within the Executive Branch. Either way, the procedural history leaves no doubt that OPR has not allowed the facts or the law to stand in the way of a misconduct finding. Rather than adhere to the credo that the government attorney wins whenever "justice [is] done," *Berger v. United States*, 295 U.S. 78, 88 (1935), OPR has consistently taken a partisan approach at every turn—often wrong but never in doubt.

In the latter stages of its five-year investigation, OPR has demonstrated a disappointing disregard for the fair process that should be the hallmark of any DOJ investigation. In particular, OPR's report is tainted by (1) the sheer length of its investigation followed by a sudden rush to completion with arbitrarily-imposed and unreasonably short deadlines; (2) OPR's steadfast refusal to provide exculpatory evidence and other documents essential to Judge Bybee's defense or even confirm the absence of any such exculpatory material; and (3) an egregious series of leaks that unfairly tainted public opinion and the press before Judge Bybee had any opportunity to review OPR's conclusions—let alone respond to those conclusions—and made it exceedingly difficult for the Department to fairly and impartially review OPR's findings. OPR's Final Report refuses even to acknowledge the bulk of these procedural shortcomings, notwithstanding repeated warnings from Judge Bybee and others, including Attorney General Mukasey and former Assistant Attorney General Goldsmith. *See* Mukasey Letter; Goldsmith Submission.

Furthermore, the substance of OPR's report betrays a results-oriented process that resolved every doubt or uncertainty against Judge Bybee. In particular, OPR repeatedly ignores or misconstrues the facts and the law to advance its own conclusions, steadfastly refusing to correct significant errors despite numerous opportunities to revise its report. Such drafting decisions make clear that OPR's report is driven less by ethical concerns then by policy disagreements regarding the CIA's interrogation program and the scope of executive power.

A. OPR's Investigation Languished For Years Before Being Rushed to Completion in Anticipation of a New Administration Taking Office

First, OPR's investigation has now dragged on for over five years for no discernable reason, even though Judge Bybee has fully cooperated along the way. Only after a new administration that had denounced the CIA interrogation program was set to take office did OPR develop a sense of urgency to finalize its report.

The Bybee Memo was leaked to the public in mid-2004, a few months before the presidential election. Later in 2004, in response to a letter from Congressman Frank Wolf, OPR opened an investigation into alleged ethical violations involving OLC's issuance of the Bybee Memos. Report at 4. OPR contacted Judge Bybee in May 2005 to inform him about the investigation and schedule an interview with him.[144] On December 9, 2005, Judge Bybee voluntarily spoke with OPR about his role in reviewing the Bybee Memo. At that time, OPR informed Judge Bybee that he would have an opportunity to make a written submission before OPR publicly released adverse findings (if any) and that it would not be necessary to delve into classified matters. After three years with virtually no word from OPR, during the 2008 holiday season we were surprised to learn from David Margolis that OPR was set to release a draft report with adverse findings—including adverse findings on the Classified Bybee Memo as to which OPR never asked him a single question—that would jeopardize Judge Bybee's professional career. In fact, OPR had already scheduled January 12, 2009, as the date on which it planned to release the report to Congress and the public. Mukasey Letter at 1. If the Office of the Deputy Attorney General had not intervened and contacted us, Judge Bybee would not have had any opportunity to submit a response despite OPR's previous assurances.

At the same time, OPR was communicating with Members (and staff) on the Senate Judiciary Committee. For example, in October 2008, OPR informed Senator Durbin's Chief Counsel that the investigation "[s]hould be done in 4-5 weeks."[145] Although OPR's rules permit it to inform complainants of the "progress ... of OPR's review of their complaints," U.S. Dep't of Justice, Office of Prof'l Responsibility, *Policies and Procedures* ¶ 13 (2008) ("OPR Policies and Procedures") (Appendix 12), surely the subjects deserve no less.

In addition, OPR utterly failed to keep the prior administration "apprised of the progress and substance" of its investigation, even though Attorney General Mukasey's office had been asking about it for several months. Mukasey Letter at 3. Instead, OPR strategically waited until the waning days of the Bush Administration to share the Draft Report with Department leadership, giving them an "unacceptably" short review period. *Id.* at 2; *see id.* ("[B]ecause OPR waited until the closing days of this Administration to share its Draft Report for comment, you have informed us that it will not be able to revise the report ... in potential response to the issues that we have identified before the Administration ends."). On December 23, 2008, OPR permitted Mukasey and former Deputy Attorney General Filip to review the preliminary draft, informing those officials that they had less than three weeks to communicate any concerns to OPR. On December 31, 2008, Mukasey and Filip met with officials from OPR to express their preliminary concerns. In the wake of the meeting, OPR informed Mukasey and Filip that it would neither finalize the report nor determine its final position regarding professional misconduct referrals before the end of the Bush Administration. In doing so, it effectively blocked any opportunity they might have had for full review and input.

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[144] Judge Bybee and his counsel also entered into a confidentiality agreement with OPR, agreeing to keep the investigation confidential. However, on February 12, 2008, Senators Dick Durbin and Sheldon Whitehouse wrote to OPR demanding an investigation into the memos, prompting OPR to reveal that such an investigation was already ongoing.

[145] Email from Keith B. Nelson, Deputy Assistant Attorney General, Office of Legislative Affairs to Chief Counsel to Senator Durbin (Oct. 1, 2009), *quoted in* Letter from Senators Durbin and Whitehouse to H. Marshall Jarrett, Counsel, OPR, (Feb. 16, 2009). Earlier, on February 12, 2008, Senators Dick Durbin and Sheldon Whitehouse wrote to OPR demanding an investigation into the memos, prompting OPR to reveal that one was ongoing. *See* Letter to from Senators Durbin and Whitehouse Glenn A. Fine, Inspector General, Department of Justice, and H. Marshall Jarrett, Counsel, OPR (Feb. 12, 2008); Letter from H. Marshall Jarrett, Counsel, OPR to Senators Durbin and Whitehouse (Feb. 18, 2008).

On January 19, 2009, Mukasey and Filip submitted a fourteen-page letter brief critical of OPR's conduct of its investigation and its conclusions. They found that "OPR bases its conclusions concerning putative professional incompetence on a collection of facts and findings, a number of which do not survive close scrutiny or are not presented in an even-handed manner." *Id.* at 5. And they warned that "the recommendation of bar referrals in the circumstances presented here is likely to have harmful consequences not only for those immediately involved, but also for the Department and ultimately for the country." *Id.* at 14.

OPR spent nearly two months revising its report in light of Mukasey's and Filip's comments, leaving its original conclusions intact and ignoring much of the analysis they specifically criticized.[146] On March 4, 2009, OPR granted us access to the resulting 200-page Draft Report and gave us a mere 60 days to respond[147]—a shorter time frame than that routinely afforded a petitioner seeking review in the Supreme Court. *See* S. Ct. R. 13 (providing 90 days to file cert petition). We pointed out that such a deadline was unrealistic and unacceptably short, particularly given the length of OPR's own investigation (at that point, over four-and-a-half years) and the length and classification level of the Draft Report itself.[148] OPR thrice refused our request to adjust the timeframe, declining to stay the deadline pending completion of our lead associate's security clearance, and even declining to provide a "short extension" of a "few days" after the Classified Bybee Memo was declassified in mid-April (at which point it appeared that OPR's Classified Draft Report would likewise be declassified).[149] After taking nearly five years to produce its Draft Report, time was suddenly of the essence, almost as if OPR was rushing to meet some unspecified external deadline.

Faced with this surprising and unreasonable refusal to budge an inch, Judge Bybee and his legal team complied with OPR's 60-day deadline and submitted a response on May 4, 2009. On August 1, 2009, after spending an additional three months revising the Draft Report ostensibly to address the numerous pervasive errors highlighted by Judge Bybee's initial submission (*but see infra* Section VI.D), OPR informed us that it had completed its final report, which runs 261 pages. The Final Report is classified in its entirety (even though the lion's share of the Draft Report was unclassified and the Classified Bybee Memo, Bradbury Memos, and CIA IG Report are now public). We were given one month to submit a classified appeal to Margolis who, to his credit, extended the deadline by an additional 37 days, to October 9, 2009, in light of the restrictive conditions in which the appeal was prepared.[150] Nonetheless, we note that the time period afforded Judge Bybee to respond to OPR's draft and final reports combined (roughly four months) pales in comparison to the more that five years that OPR has taken to complete its process.

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[146] Email from David Margolis, Associate Deputy Attorney General to Maureen Mahoney, *Re: Judge Bybee* (Feb. 25, 2009) ("OPR has revised its draft, but its conclusions regarding your client have not changed.").

[147] Email from H. Marshall Jarrett, Counsel, OPR to Maureen Mahoney, *Re: Draft OPR Report* (Mar. 5, 2009).

[148] Letter to H. Marshall Jarrett, Counsel, OPR, from Maureen E. Mahoney, *Re: Deadline for Responding to Draft OPR Report* 2 (Mar. 10, 2009).

[149] *See* Letter to H. Marshall Jarrett, Counsel, OPR, *Re: Deadline for Responding to Draft OPR Report* (Mar. 10, 2009); Letter to Maureen E. Mahoney from H. Marshall Jarrett, Counsel, OPR (Mar. 11, 2009); Email to Maureen Mahoney from [redacted], OPR, *Re: Reclassification of Draft Report* (Apr. 21, 2009); Email to Maureen Mahoney from [redacted], OPR, *Re: Declassified Version of OPR Draft Report*; (Apr. 24, 2009).

[150] Our work could only be completed in a sensitive compartmented information facility ("SCIF") with limited hours and no access to resources essential to the efficient preparation of legal work product, such as

In its Final Report, OPR claims that the investigation was "long and difficult" and "hampered" by the loss of or "limited access to ... key underlying documents"; the "need to seek voluntary cooperation" (often not forthcoming) of many witnesses; "time spent obtaining the necessary security clearances"; "limited OPR resources"; and an "unprecedented number of complex investigations of high-level officials occurring during this same time period." Report at 14-15. We do not doubt the obstacles OPR faced in this process. But they obviously do not begin to explain why this investigation took more than five years. And many of these same constraints applied to Judge Bybee's response to OPR's report and yet little consideration was forthcoming.

B. OPR Refused to Disclose Exculpatory Evidence

OPR has refused to provide Judge Bybee with exculpatory and other highly relevant evidence necessary to prepare his response to OPR's Report.[151] Despite our numerous requests,[152] OPR categorically denied access to "any non-public documents" that OPR "considered in preparing the report" (including, e.g., "any underlying classified source materials" and records of witness interviews), except for Judge Bybee's own interview transcript and the Classified Bybee Memo.[153] OPR even rebuffed our narrowly-tailored compromise request for

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electronic research, paralegal support, and email. (We hasten to add that the SCIF staff, a neutral party, made every effort to accommodate us, notwithstanding the severe constraints of time and space.)

[151] Early on, in advance of Judge Bybee's 2005 interview, OPR accommodated certain reasonable requests to obtain a copy (albeit subject to a confidentiality agreement) of some of the email traffic between the OLC attorneys during the time period in question. It also allowed Judge Bybee to view certain classified materials, *accord* Report at 6 n.4, although counsel did not have access as they were not cleared by the time of the interview, Bybee Tr. at 7. OPR informed counsel that they would not need to address or respond to classified material and suspended the clearance process. OPR's lead investigator assured counsel that it was unlikely that classified materials would prove relevant. *See* Bybee Tr. at 8 ("I don't think we'll be discussing [the Classified Bybee Memo] in great detail.").

However, over time OPR adopted a more adversarial stance on providing access to relevant materials. For example, in late 2007, in light of recent press reports, we asked OPR for permission to view the 2005 Bradbury Memos (which were then still classified) because they would bear on Judge Bybee's defense. OPR responded: "I don't think it really will be relevant to any of the issues involved with respect to your client. And furthermore, I think it's very unlikely that you would be allowed to look at them at this point." Voice Message to Everett Johnson from [redacted] (Oct. 17, 2007). OPR itself had viewed the Bradbury memos (Report at 7) along with a host of other documents (*see* Barron Decl. in FOIA case).

[152] *E.g.*, Letter from Maureen E. Mahoney to H. Marshall Jarrett, Counsel, OPR, *Re: Deadline for Responding to Draft OPR Report* (Mar. 10, 2009) ("Mahoney Mar. 10 Letter") (requesting all non-public documents, including transcripts of all witness interviews and all exculpatory evidence, that OPR reviewed in the courts of its lengthy investigation and/or relied upon in making the allegations in the Draft Report); Letter from Maureen E. Mahoney to Mary Patrice Brown, Acting Counsel, OPR, *Re: Response to Draft OPR Report* 1 (Apr. 15, 2009) (requesting access to "any exculpatory statements, interview transcripts, and supporting documents that OPR collected in the course of its lengthy investigation").

[153] Mahoney Mar. 10 Letter; Letter to Maureen E. Mahoney from H. Marshall Jarrett, Counsel, OPR (Mar. 11, 2009) ("[N]either OPR nor the Department provides access to such materials in a review or appeal context, and we decline to do so in this case.").

the Bradbury Memos (which was made and rejected prior to DOJ's disclosure of the Classified Bybee and Bradbury Memos to the ACLU). OPR also opaquely avoided answering counsel's request for exculpatory evidence, refusing to confirm the absence of any such evidence, and instead stating that OPR "decline[s] to provide additional documents ... at this time" because it "would not be consistent with the purpose of the review and comment process." OPR suggested we could apprise it whether "facts in the report are inaccurate or misleading," but, of course, that was not fully possible without viewing the underlying evidence. We were instead forced to rely on OPR's characterization of that evidence—which has repeatedly proven wanting. *See supra* Section II; *infra* Section VI.D.

Despite these limitations, we have learned that OPR had access to, but failed to disclose, a host of exculpatory statements from witnesses (such as Jack Goldsmith and Patrick Philbin), who do not share OPR's view that Judge Bybee committed professional misconduct, *see id.*, as well as evidence revealing that additional executive branch attorneys (such as Larry Thompson and John Bellinger), concurred in the Bybee Memos, *supra* Section II.D. OLC also refused to permit Judge Bybee access to critical documents demonstrating that subsequent OLC and DOJ attorneys (Levin, Bradbury, and Comey) reaffirmed the Classified Bybee Memo techniques and substantially agreed with many of the Bybee Memo's conclusions. But for the fortuity of the declassification of additional OLC memoranda and the CIA IG Report in the last few months, Judge Bybee would have been deprived of such highly relevant evidence showing, for example, the following:

- In the fall of 2004, Levin re-approved the CIA's use of waterboarding (as well as the other techniques in the Classified Bybee Memo and three additional techniques) in a series of two-page letters (with legal reasoning to be supplied "at a later date"). And Levin, by approving the techniques under *all* applicable laws and treaties, went even further than the Bybee Memos.

- In 2005, Bradbury re-approved the same techniques under the anti-torture statute and *also* concluded that the techniques would not even be considered "cruel, inhumane, or degrading" under Article 16 of the CAT.

- In 2007, Bradbury also cleared the techniques under Common Article 3 of the Geneva Conventions, the War Crimes Act, and the Detainee Treatment Act; and that, in 2007, Bradbury routinely authorized the extension of one of the techniques (sleep deprivation) on particular individuals in a series of two-page letters.[154]

It is also plainly relevant that, in reaching similar—and often *broader*—conclusions, some of these documents contain markedly *less* analysis than the Bybee memos.

Ultimately, it was not until two months after Judge Bybee submitted his response to

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[154] *See* Letters from Daniel B. Levin, Acting Assistant Attorney General, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (Aug. 6, Aug. 26, Sept. 6, and Sept. 20, 2004) (stating that OLC "will supply, at a later date, an opinion that explains the basis for this conclusion"); Letters to [Redacted], Associate General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General (Aug. 23, Nov. 6, and Nov. 7, 2007).

OPR's Draft Report that the New York Times confirmed that many additional senior officials at the Department agreed that the techniques under consideration in the Classified Bybee Memo were legal. *See* Scott Shane & David Johnston, *U.S. Lawyers Agreed on Legality of Brutal Tactic*, N.Y. Times, June 6, 2009; *supra* Section II.D. Consequently, in July 2009, we again wrote to OPR expressing our dismay that such critical exculpatory had not been provided to Judge Bybee and renewing our earlier requests. In a brief rejection letter, OPR restated its belief that "subjects of an OPR investigation have no 'right' to discovery, and there is no 'obligation' to provide 'exculpatory' information to the subject of an OPR administrative investigation."[155] It also repeated that, after completion of the Final Report, Judge Bybee was "of course free to advise" it of any information not present in the Report. But, in repeatedly hiding behind this convenient Catch-22, OPR has it exactly backwards. Fairness here demands that the government *make* Judge Bybee aware of relevant information in its possession because he no longer has access to DOJ files—especially that which Judge Bybee has specifically requested. Given the long list of documents to which we were not given access, it is impossible to know what else OPR has withheld.

Such refusals are particularly troubling in the wake of Attorney General Holder's decision to abandon the case against former Senator Stevens, in large part due to the prosecutors' failure to turn over key evidence.[156] *Cf. Brady v. Maryland*, 373 U.S. 83 (1963). It is even more disheartening in light of comments made by Acting Counsel Mary Patrice Brown herself. As she aptly commented shortly after her appointment to OPR in the wake of the Stevens scandal:

> If your gut is telling you [that] you do not want the defense to have this, then that tells you [that] you must turn it over. That's how we were trained. People who don't do that, and hold things too close to the chest, those are the people who run into trouble .... In a white-collar case, the way I was trained, was for heaven's sakes, turn it all over. ***What are you hiding?*** It's easier that way.[157]

The refusal to take even this basic step calls into question the fundamental fairness of the whole process and suggests that OPR has not heeded the Attorney General's clarion call to uphold the Department's "commitment to justice." Press Release, DOJ, *Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens* (Apr. 1, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html.

C. Repeated Leaks of OPR's Draft "Results" Prejudiced Judge Bybee

Numerous high-level leaks of the "results" of OPR's Draft Report in early 2009—before

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[155] Letter from Mary Patrice Brown, Acting Counsel, OPR, to Maureen Mahoney (July 22, 2009).

[156] *See* Press Release, DOJ, *Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens* (Apr. 1, 2009), *at* http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html. In a similar vein, the White House, in firing the AmeriCorps Inspector General Gerald Walpin, cited an alleged "*fail[ure] to disclose exculpatory evidence.*" Letter from Norman L. Eisen, Special Counsel to the President, to Senators Joseph Lieberman and Susan Collins (June 16, 2009).

[157] Joe Palazzolo & Mike Scarcella, *New OPR Chief Predicts More Transparency in Attorney Investigations*, The Blog of Legal Times, May 06, 2009; *see also* Justin Blum & James Rowley, *Holder Replaces Head of Justice Agency's Ethics Units*, Bloomberg News (Apr. 8, 2009).

OPR had permitted Judge Bybee to review a copy let alone afford him an opportunity to respond—placed Judge Bybee in the untenable position of being prejudged by the public and the press without a concurrent ability to defend himself. The leaks also served to increase political pressure on the Department itself, making it very difficult for Judge Bybee to obtain an objective review of OPR's conclusions.

In early 2009, an unknown source with knowledge of highly classified material (suggesting a high-level official or someone within OPR) leaked the preliminary results of the OPR Draft Report to the press, before Judge Bybee or his counsel had reviewed it.[158] We promptly sent OPR a letter highlighting the prejudice resulting from the leak and explaining why the disclosure violated established DOJ and OPR policy. We pointed out that, as the Department had previously explained, it is "vital" to maintain confidentiality because "[t]he unauthorized public disclosure of information concerning ongoing investigations is particularly damaging." Memorandum from the Deputy Attorney General to Heads of Department Components, *Re: Public Disclosure of Information* 1-2 (May 7, 2002). Also, we noted that OPR's own rules provide for public disclosure only *after* "the matter is concluded" and "all available administrative reviews have been completed"; the subjects are permitted to object on privacy grounds; and the Attorney General has made the final decision to release the report. OPR Policies and Procedures ¶¶ 6, 12. Further, the leaks might well be a violation of the Privacy Act. *See* 5 U.S.C. § 552a.

Although OPR initially apparently took no steps to stem the tide of leaks, Margolis intervened and forwarded the matter to the Department's Inspector General. Nonetheless, the leaks continued,[159] with wholly predictable effects—fueling cries for impeachment and even criminal prosecution,[160] as well making it politically difficult for OPR to afford a full and fair review. Indeed, two Senators publicly issued what was in essence a warning to OPR not to change its previously-established findings regardless of the merits of Judge Bybee's response.[161] Two days after Judge Bybee's May 4, 2009 submission to OPR, the New York Times, apparently reflecting yet another leak, reported that government officials indicated that "they did not expect major alterations in its main findings or recommendations."[162] Accordingly, we again "express[ed] our serious concern" about the ongoing leaks and requested a "public statement denouncing the leaks as inappropriate and stating unequivocally that the Department has not reached any conclusion."[163] No such statement was forthcoming, although Acting Counsel Mary Patrice Brown responded with a letter stating that she was "equally distressed" by the leaks.[164]

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[158] *See, e.g.*, Jason Leopold, *Obama Aides Dispute CIA Chief's Comments About Torture Probes*, The Public Record, Jan. 17, 2009 ("[T]here is a likelihood that the OPR investigation will recommend that Yoo and Bybee be 'rebuked', for the way in which they interpreted a law that formed the basis of the memo, according to people familiar with the OPR's probe."); Michael Isikoff, *A Torture Report Could Spell Big Trouble for Bush Lawyers*, Newsweek, Feb. 23, 2009 (first internet publishing Feb. 14, 2009) ("According to two knowledgeable sources who asked not to be identified ..., [the draft completed at the end of the Bush administration] sharply criticized the legal work....").

[159] *See, e.g.*, Jason Leopold, *DOJ Investigation Into Yoo's Legal Work Reaches Damning* Conclusions, The Public Record, Mar. 4, 2009.

[160] *See, e.g.*, Editorial, *The Torturers' Manifesto*, N.Y. Times, Apr. 18, 2009; Editorial, *The Torture Debate: The Lawyers*, N.Y. Times, May 7, 2009; Arthur Delaney, *Conyers, Nadler Call for Special Counsel to Investigate and Prosecute Torture*, Huffington Post, Apr. 28, 2009; Press Release, Eighth Congressional District of New York, *Nadler: Justice Department Report Shows Necessity of Special Counsel to Investigate Torture* (May 7, 2009).

[161] Letter to M. Faith Burton, Acting Assistant Attorney General, Office of Legislative Affairs, from Senators Durbin and Whitehouse (Mar. 31, 2009) (expressing "concern[]" that they would receive a final report "that has undergone significant revisions at the behest of the subjects of the investigation").

OPR is right to be concerned now but, unfortunately, the damage is done. As Goldsmith has forcefully argued:

> It is unfortunate that elements of the OPR investigation and report have leaked to the press over many years. These leaks have caused reputational harm to the people who are subject of the investigation. This is unfair because the people criticized in the press accounts have no way to respond to the substance of the accusations since only conclusions are leaked. Even if the leaks did not originate in OPR or DOJ, OPR and DOJ share responsibility for them, for the leaks are made possible by the fact that OPR's much-publicized investigation has lasted nearly five years. It is very disappointing, to say the least, that DOJ has allowed its former officials to be treated in this way. To my mind the length of the investigation and the regular stream of leaks over many years *undermine confidence in the OPR process.*

Goldsmith Submission at 2.

Overall, these numerous procedural irregularities call into question the degree to which Judge Bybee has received a fair hearing. OPR's arbitrary deadlines, its refusal to disclose exculpatory evidence, and its laxness toward damaging leaks all combine to cast doubt on the impartiality of its underlying work product. In addition, as discussed below, OPR's Report itself provides further evidence of an investigatory process committed to making adverse findings no matter where the facts or law led.

D. OPR Repeatedly Ignores or Misconstrues The Facts and The Law to Advance Its Own Conclusion

OPR's Report, now in its third iteration, has at every step reflected a one-sided and outcome-driven approach, consistently skewing the facts and the law to support OPR's findings. Attorney General Mukasey observed that OPR's preliminary draft was "not presented in an even-handed manner." Mukasey Letter at 5. And the subsequent drafts have fared no better. Notwithstanding multiple opportunities to correct course, OPR still ignores, misconstrues, or artfully-cites key facts, key testimony, and key judicial precedent; and utterly fails to cite *any* ethics precedents from the relevant jurisdiction (with one exception), *any* of OLC's or DOJ's pre-Bush administration precedent, or *any* of OPR's own precedents. Collectively, these omissions and distortions, always favoring OPR's ultimate finding of professional misconduct, suggest that OPR has long had a desired conclusion and is just in search of a supporting rationale.[165] Although these errors pervade OPR's Final Report, we highlight a handful of examples below.

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[162] David Johnston & Scott Shane, *Interrogation Memos: Inquiry Suggests No Charges*, N.Y. Times, May 6, 2009.

[163] Letter from Maureen E. Mahoney to Mary Patrice Brown, Acting Counsel, OPR, *Re: Justice Department Leaks* (May 6, 2009).

[164] Letter to Maureen Mahoney, from Mary Patrice Brown, Acting Counsel, OPR, *Re: Judge Jay S. Bybee* (May 6, 2009).

- ***Safeco.*** OPR did not bother to cite *Safeco* in the Draft Report, even though it is the Supreme Court's most recent exposition of the recklessness requirement—the cornerstone of OPR's case against Judge Bybee. And *Safeco* conclusively demonstrates that no finding of recklessness is possible here. *See supra* Section III.C. Yet OPR dismisses *Safeco* in a footnote of its final report for reasons that are completely indefensible—not even colorable. Report at 19 n.19.

- ***Price.*** OPR's continuing refusal to cite *Price* is remarkable, as it is arguably the strongest precedent to date in support of OLC's interpretation and application of "severe pain," *see supra* Section IV.B, and it featured prominently in Judge Bybee's Draft Response (at 3, 4, 36, 38, 41, 47, 49, 51, 85). OPR's failure to acknowledge this case, decided one month before the Bybee Memo, is willful and inexplicable.[166]

- ***Pierre.*** OPR did not bother to cite *Pierre* in the Draft Report and now dismisses it out of hand as having "no bearing on whether its authors presented a thorough view of the law at that time." Report at 175 & n.132. With all respect, this is nonsense. *Of course* it is relevant that, against the same legal backdrop, ten highly-respected jurists in *Pierre* later conducted the same analysis and reached the same conclusion on specific intent as the Bybee Memo. *See supra* Section IV.A. Moreover, OPR has no hesitation citing subsequent authorities when it suits its purposes. *See, e.g.*, Report at 178-79 (relying on subsequent criticisms and withdrawals by Goldsmith, Levin, and Bradbury, from 2003 to 2009); *id.* at 16-18, 22 (relying on OLC Guiding Principles, written in 2004); *id.* at 22 (relying on OLC's Best Practices Memo, written in 2005); *id.* at 26 n.27 (relying on *Hamdan*, decided in 2006).

- ***Youngstown.*** OPR still makes no mention of the scores of prior OLC opinions that do not cite *Youngstown* (Appendix 17) yet continues, as it did in its Draft Report, to base its misconduct findings on the Bybee Memo's failure to cite *Youngstown*. *See supra* Section IV.F.4. This is, frankly, embarrassing.

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[165] Indeed, there is evidence that OPR reached a preordained conclusion years ago, long before completing its initial draft report. Jack Goldsmith, for example, expressed serious concern that, when he was interviewed by OPR in the initial stages of its investigation, OPR had apparently already formed "premature adverse conclusions." Goldsmith Submission at 2. Goldsmith remarked on the "relatively poor understanding" the OPR attorneys appeared to have of such "complex, esoteric, and contested" issues as the "domestic and international law of interrogation and the constitutional law of presidential power." *Id.* Similarly, OPR's questions to Judge Bybee in his 2005 interview were consistently couched in terms of how "critics" viewed the Bybee Memos (*e.g.*, Bybee Tr. at 61, 70, 78, 88), suggesting that OPR had already adopted a negative outlook toward OLC. And, indeed, the views OPR expressed at the interview reappeared in OPR's eventual Draft and Final Reports.

[166] Ironically, the Bybee Memo itself missed *Price*, as it was handed down only one month before the Bybee Memo was submitted. OPR has no such excuse. So, perhaps the Bybee Memo's most significant omission is a case that would only have lent *support* to the Bybee Memo's conclusions. So OPR ignores it.

- ***OLC precedent.*** In fact, OPR studiously ignores *all* prior OLC and DOJ opinions from past administrations, even though those would surely be the best barometer of what is required and expected of OLC attorneys. *See* D.C. Rule 1.1(b) (requiring attorneys to use "skill and care *commensurate with* that generally afforded to clients by other *lawyers in similar matters*").[167] To anyone familiar with OLC's precedent and longstanding Department practices—dating to the Judiciary Act of 1789—OPR's demands of form and substance are preposterous. *See supra* Section III.B-C; Goldsmith Submission at 2-4 (raising several historical examples in national security context).

- ***Ethics precedent.*** Even after Judge Bybee surveyed numerous D.C. cases and pointed out OPR's egregious error in failing to include any such cases, OPR continues to ignore all D.C. ethics decisions, save one case perfunctorily added to a footnote in OPR's final report. *Compare* Bybee Draft Response at 7, 20, 23, 28, 30, 56, 59, 72, 84, *with* Report at 23 n.25. OPR cites no decisions finding a disciplinary violation from *any* jurisdiction. And OPR does not cite a single Rule 2.1 case from any jurisdiction. Its conclusions are, literally, unprecedented.

- ***OPR's mistaken identity.*** OPR does not seem to realize that it must not "put [itself] in the position of a sort of court of appeals from lawyers' judgments." *In re Stanton*, 470 A.2d at 287; *see supra* Section III; Bybee Draft Response at 7, 23, 59, 84. Refusing to acknowledge this governing precedent, OPR simply proclaims that it "reject[s]" this constraint. Report at 14 n.14. But, as *In re Stanton* teaches, OPR cannot—no matter how much it would like to—arrogate the power to substitute its own legal and policy preferences for the judgment of the OLC attorneys. Indeed, it is the height of arbitrariness for bureaucrats to simply "reject" those rules that they find inconvenient.

- ***OPR's "unprecedented" investigation.*** OPR has apparently conceded that, as former Attorney General Mukasey stated, its crusade is "unprecedented." Mukasey Letter at 2. Remarkably, even after being confronted with this its own record, OPR is *still* unable to point to any OPR investigations in even remotely analogous circumstances, second-guessing OLC legal opinions or engaging in complex statutory and constitutional interpretation. *See* Bybee Draft Reponses at exh.3 (listing past investigations); Appendix 13 (same).[168]

- ***Legal ethics experts.*** OPR utterly dismisses Professor Ronald Rotunda's brutally frank assessment of OPR's investigative process and end results. That OPR would ignore the considered view of a renowned expert in professional responsibility and author of a leading legal profession textbook speaks volumes.[169]

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[167] In fact, it also cites just one Bush-era precedent (other than the opinions at issue), and only then to disagree with it on the merits and dismiss its precedential value because it was "an OLC opinion that [Bybee] himself signed five months earlier." Report at Report at 202 n.156 (discussing the *Transfer Opinion*).

[168] Judge Bybee did not, as OPR mistakenly asserts, claim that "OPR has never previously reviewed legal advice," Report at 14 n.14, merely that OPR's "traditional role" appears to be "investigating wrongdoing of *current* Department employees in actual *litigation*," Bybee Draft Response at 84. In response, OPR simply states: "That claim is incorrect." And cites: nothing. Report at 14 n.14.

- ***Government Officials.*** OPR relies heavily on subsequent government officials that disagreed with the Bybee Memo, but downplays, to the point of disguising, the fact that those (and other) officials overwhelmingly believe Judge Bybee acted in good faith. OPR has treated with contempt the thoughtful statement made by no less than three Attorneys General (Michael Mukasey, Alberto Gonzales, and John Ashcroft) and four heads of OLC (Jack Goldsmith, Daniel Levin, Steven Bradbury, Timothy Flanigan) in support of the Bybee Memo authors. *See supra* Section II.A.

- ***CIA.*** OPR inexplicably asserts that the CIA "had no institutional experience or expertise" in the field of interrogation (Report at 31), when in fact that was demonstrably false. *See infra* IV.H.3. OPR claims that there was "no indication" that the CIA "had specific information about terrorist operations that were *underway*, or that posed immediate threats," Report at 212 n.168, ignoring the evidence showing that an al Qaeda plot had "*gone operational.*" *Supra* Section II.C, IV.G.1. The idea that OPR is equipped to second-guess the CIA—much less the OLC *for relying on* the CIA—is absurd.

E. OPR's Analysis is Improperly Influenced by Policy Disagreements Regarding the CIA's Interrogation Program

Finally, OPR's Report strongly suggests that this investigation is about core policy disagreements masked as ethical concerns. From its reliance on ideological critics (*e.g.*, Report at 3), to the slanted assumptions that underlie its flawed analysis (*e.g.*, *id.* at 25), OPR tips its hand that a finding of ethical misconduct was never in doubt.

First, from its opening pages and throughout its Report, OPR relies upon and takes at face value the opinions of various ideological critics, philosophers, academics, and political activists. *See id.* at 2 ("Some commentators, law professors, and other members of the legal community were highly critical of the Bybee Memo."); *see also*, *e.g.*, *id.* at 2-3, 176 n.133, 192 n.146, 204, 207 n.160, 212 n.168 (citing David Luban, Harold Koh, Kathleen Clark, Scott Horton, and others). OPR's hastily-added disclaimer that "although [it] refer[s] to works of legal commentary in this report, [it] did not base [its] conclusions on any of those sources" (Report at 10), is both dubious and late. *See* Mukasey Letter at 8 ("The Draft Report ... appears to rely substantially on others' analyses ....").

For example, in its attempt to refute the ticking time bomb scenario, OPR relies heavily on its belief that "scholars have argued that the scenario is based on unrealistic assumptions and has little, if any, relevance to intelligence gathering in the real world." Report at 212 n.168 (citations omitted). Similarly, OPR also bases its entire criticism of the Classified Bybee Memo's treatment of waterboarding on the historical evidence in a single law review article first published in 2007. *Id.* at 234 n.192 (citing Wallach, *Drop by Drop*). And, as Judge Bybee noted in his initial draft response (at 23), nearly all of the legal citations (what few there are) in OPR's discussion of the proper ethical standard are derived from a single article in the Suffolk Law

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[169] Of course, we have no way of knowing whether OPR sought expert assistance (unlikely) but there is no doubt that OPR would have disclosed any *unfavorable* opinions it obtained.

Review. *See* Bybee Draft Response at 23 (citing Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyer's Papers*, 31 Suffolk Univ. L. Rev. 1 (1997)).

In addition, OPR's report, like its predecessor, relies on the criticisms and analysis of Professor David Luban, yet provides no explanation for why his work is remotely authoritative or why it should be credited over the work of other legal academics, commentators, and ethics experts who have defended the memos. *See* Report at 176 n.133, 204, 207 n.160. Indeed, Professor Luban is not an attorney but rather a trained philosopher and vocal critic of the Bush Administration—hardly a neutral source. *See* Mukasey Letter at 8. To illustrate, Professor Luban has opined that "[o]ne way to understand the Bybee Memo is that it represents an odd moment when several stars and planets fell into an unusual alignment and the moonshine threw the Office of Legal Counsel into a peculiarly aggressive mood." David Luban, *Liberalism, Torture, and the Ticking Bomb, in The Torture Debate in America* 72 (Karen J. Greenberg ed. 2005).

Many of OPR's other sources are equally one-sided. *See* Report at 2-3 (citing Scott Horton, Harold Koh, Kathleen Clark, and others). Harold Koh, cited at 2-3 for his opinion that the memos are "blatantly wrong," perhaps best embodies (unintentionally so) the tenor and tone of OPR's apparent fait accompli when he elsewhere stated that he would "rather have" a decision-maker "who uses the wrong reasoning ... to get right results, and let other people figure out the right reasoning." Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, The New Republic, May 2, 1994. Like OPR, Koh knows where he wants to go and is not too particular about how he gets there. Similarly predisposed is Scott Horton (cited at 3), who has elsewhere opined that "the period from late 2001-January 19, 2009, this country was a dictatorship" and has also called Guantanamo an "American GULAG." *See* Scott Horton, *George W. Bush's Disposable Constitution*, Harper's Magazine, Mar. 3, 2009; Scott Horton, *Less Than Human*, Harper's Magazine, Jan. 14, 2008. Also, the "group of more than 100 lawyers, law school professors, and retired judges" who criticized the Bybee Memos (Report at 3) includes ideological signatories such as the ACLU, Alliance for Justice, CCR, Human Rights Watch, and People for the American Way. It is inconceivable that an investigative body that was truly neutral about the merits of the CIA interrogation program would put any weight whatsoever on the views of these political activists. And it is quite telling that OPR gives only perfunctory treatment to favorable commentary. Report at 3-4 & n.1.[170]

Second, OPR's analytical approach is based on the skewed premise that the Bybee Memos authorize torture and thus abrogate a norm of *jus cogens*—a "principle[] of international law so fundamental that no nation may ignore [it]." *See, e.g., id.* at 24 (starting from the premise that "that 'the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*'"); *id.* at 25 ("Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standard of professional conduct."). For example, OPR repeatedly states that the Bybee Memo's Commander-in-Chief analysis justifies "acts of outright torture." *Id.* at 196; *see also, e.g., id.* at 196, 201, 204, 227, 256-57. This, of course, both begs the question and badly misconstrues OLC's analysis of whether Congress can interfere with the President's battlefield decisions.

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[170] For example, OPR now for the first time mentions (in a footnote) Professor Paulsen, who has previously written supportive material that OPR failed to include in its draft report. *See* Draft Bybee Response at 59-60, 62; *see also* Paulsen Testimony; Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762 (2009); Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 Ga. L. Rev. 807 (2006). OPR also does not confront the serious criticisms in Professor Ronald Rotunda's submission.

Furthermore, even on its own terms, OPR's invocation of *jus cogens* norms is slanted. As discussed above, it is undisputed that the CIA's interrogation program was directed at preventing further terrorist attacks, deaths which would unquestionably be considered murder. *See supra* Section II.A-C. Yet, even though OPR concedes that "murder" is itself a *jus cogens* norm (Report at 25 n.26), OPR nowhere accounts for such countervailing factors. Instead, OPR apparently demands that OLC ignore such genuine security concerns and draft an opinion steering the CIA far away from interrogation techniques that might approach the line of severe mental or physical pain. OPR thereby puts OLC in an untenable position, and as Philbin noted, *supra* II.C, the *jus cogens* argument would likely be reversed if OLC had withheld its opinion and a second wave of attacks had occurred.

In sum, OPR has consistently stacked the deck throughout its investigation and in its successive draft and final reports. OPR strategically waited years for the right atmosphere to press forward, denied critical evidence, and permitted egregious leaks. OPR has now settled on a one-sided product—ignoring all warning signs, consistently ignoring controlling facts and law (to Judge Bybee's detriment) and instead relying on a bevy of ideological critics and its own ideas of what should and should not be permitted in a perfect world. At every turn, it became clearer and clearer that OPR is not, and was never, interested in the truth, but only marshalling that which advances its apparently predetermined course of action. This is no way to conduct an investigation.

VII. THE LONG-TERM COSTS OF PUNISHING DIFFERENCES IN OPINION

If DOJ adopts OPR's report it will be terribly damaging to the Office of Legal Counsel—and, indeed, to the Department of Justice, generally—in at least three ways: (1) it will necessarily discourage lawyers from offering candid legal opinions any time they involve politically-charged subjects in order to avoid ethics investigations by future administrations; (2) it will hinder OLC's efficiency by requiring supervisors to second-guess the research and analysis of their line attorneys; and (3) it will invite partisan rancor and a flurry of OPR complaints against government attorneys of all stripes. Judge Bybee raised all of these issues in his draft response (at 80-85) and Jack Goldsmith, Timothy Flanigan, and former Attorney General Mukasey each likewise took pains in their submissions to stress the severe consequences that are sure to flow from OPR's investigation (Goldsmith Submission at 5; Flanigan Decl. ¶ 9; Mukasey Letter at 14). In keeping with its generally dismissive posture, OPR has inexplicably failed even to acknowledge—let alone address—the weighty concerns of the individuals best-positioned to speak to such matters.

First, as Goldsmith has argued, allowing OPR to second-guess the merits of OLC opinions with the benefit of hindsight runs the risk of producing an "enormous chilling effect" as "lawyers will become excessively cautious in giving advice and will substitute predictions of political palatability for careful legal judgment." Goldsmith Submission at 5. Indeed, "DOJ lawyers will now understandably worry that their deliberations might be picked over and used against them in an ethics investigation." *Id.* Goldsmith remarked that "OPR's investigation to date has contributed a great deal to this problem." *Id.*[171] Conversely, the specter of post hoc ethics investigations may skew all future opinions in a particular direction, to match the views of OPR or the halls of academia. Either way, such a process of running legal advice through a "political filter," Goldsmith warned, "is not good for DOJ, the executive branch, or the nation." *Id.* In fact, Goldsmith explained, many people believe such cautious legal advice "led to government structures and attitudes that precluded detection of the 9/11 plot." *Id.*

But OPR chose not to quote, explain, or even reference any of Goldsmith's concerns, noting only that he "sent ... a memorandum discussing the OPR investigation" and "never believed that the analysis in the opinions 'implicated any professional misconduct.'" Report at 10, 197 (quoting Goldsmith Submission at 1). Turning a blind eye to Goldsmith's serious misgivings is especially incongruous with the extent to which OPR elsewhere relies throughout its Report on Goldsmith's criticisms of the OLC memos. *See, e.g., id.* at 112, 117-20, 121-22, 179, 203, 205.

And Goldsmith is not alone in his misgivings. Former OLC head Timothy Flanigan, for example, has stated (Flanigan Decl. ¶ 9):

> [B]ased on my experience as a former Assistant Attorney General of OLC, I believe that adverse action by OPR against Judge Bybee or Professor Yoo would have a long-term chilling effect on the willingness of OLC attorneys to render opinions on difficult and sensitive areas of law. Such an action will be seen as a strong signal to OLC attorneys to avoid any legal conclusion or analysis that, although a reasonable application of relevant authority, may be controversial. This, in turn, will tend to artificially limit the range of legal opinions available to the President ....

Similarly, Attorney General Mukasey has also concluded that government lawyers will treat OPR's investigation as a "cautionary tale—to take into account not only what they honestly conclude, but also the personal and professional consequences they might face if others, with the leisure and benefit of years of hindsight, later disagreed with their conclusions." Mukasey Letter at 14; *see also* Michael Mukasey & Michael Hayden, *The President Ties His Own Hands on Terror*, Wall St. J., Apr. 17, 2009 ("It is hard to see how [exposing OLC's legal advice to "public and partisan criticism"] will promote candor either from those who should be encouraged to ask for advice before they act, or from those who must give it."); Roundtable with Attorney General Mukasey (noting the potential for creating an "incentive not to give an honest answer but to give an answer that may be acceptable in the future" and an "incentive in people not to ask in the first place"). OPR also ignored Mukasey's comments on this score. *See* Report at 9 (noting only that Mukasey was "highly critical of the draft report's findings").

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[171] It is hard not to notice that the Levin and Bradbury Memos each took a far more abstract (and correspondingly less useful) approach—declining, for example, "to try to define the precise meaning of 'specific intent' in section 2340." Levin Memo at 16-17; Bradbury Techniques Memo at 28.

Furthermore, Professor Paulsen, a former OLC attorney, recently testified before Congress that second-guessing executive branch attorneys' legal analysis would "unquestionably" chill "the candor, quality, and vigor of the legal advice" and, in fact, would discourage "talented attorneys" from undertaking government service in the first place. Paulsen Testimony at 8. Paulsen elaborates:

> If a government attorney's legal advice in the service of one administration is subject not only to being reversed in a subsequent administration of different views (as is common, reasonable, and sometimes to be expected), but, further, also made the subject of retrospective investigation, punishment (in various forms), and personal attacks, there is *no question* that the attorney's advice will become more guarded, tepid, inhibited, over-cautious and—in many cases—ultimately unsound.

Id. The end result will be that "presidents and administrations of both parties *will not obtain candid, vigorous legal advice reflecting the full range of views*, on sensitive matters of war, foreign affairs and national security," which, "over the long run," will be "harmful to the national security of the United States." *Id.* (emphasis in original). Paulsen thus unequivocally concludes that "investigat[ing], and seek[ing] to impose political, personal, or other punishment on government attorneys who provide good-faith but controversial legal advice, whenever that advice might become out-of-favor politically, will damage the Office of Legal Counsel, the Department of Justice, and ultimately, the office of President of the United States." *Id.*[172]

In short, rather than promote the "thorough, objective, and candid" legal advice that OPR desires, OPR's investigation will produce the exact opposite: anodyne opinions protecting against ethics charges lest future political winds shift direction.[173]

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[172] Also, a 20-year veteran prosecutor who served in the Department of Justice under Presidents of both parties recently noted that in light of OPR's investigation, "any prudent lawyer would have to hesitate before offering advice to the government." Letter to Attorney General Holder from Andrew McCarthy (May 1, 2009). He further lamented that "a lawyer who in good faith offers legal advice to government policy makers—like the government lawyers who offered good faith advice on interrogation policy—may be subject to investigation and prosecution for the content of that advice, in addition to empty but professionally damaging accusations of ethical misconduct." *Id.*; *cf.* Richard N. Haass, *The Interrogation Memos and the Law*, Wall St. J., May 1, 2009 ("[P]rosecution of Justice Department officials would have a chilling effect on future U.S. government officials. Few would be brave or foolhardy enough to put forward daring proposals that one day could be judged illegal.... With the threat of prosecution, serious memos on controversial matters will increasingly become the exception rather than the rule."). Similarly, in defending John Yoo in a civil suit premised on his OLC writings, the government recognized (in pleadings subsequently adhered to by the Obama Justice Department) that imposing liability based on legal opinions would "impact[] the ability of Executive Branch and military officials to seek and obtain unfettered legal analyses and advice for their use in decision-making, thereby aiding our enemies and making the United States more vulnerable to terrorist attack." Motion to Dismiss at 23, *Padilla v. Yoo*, No. 08-00035 (N.D. Cal. Apr. 1, 2008); *see also id.* at 16-17 ("fear of personal liability" may interfere with Executive Branch's ability to receive "unfettered legal analyses and advice from individual OLC attorneys"); Jake Tapper, *Obama Seeks Dismissal of Case Against John Yoo, Author of 'Torture Memo'*, ABC News (Mar. 7, 2009), *available at* http://blogs.abcnews.com/political.punch/2009/03/obama-seeks-dis.html.

[173] And when political winds do shift direction, these fears will discourage OLC from correcting or reversing its opinions lest doing so trigger ethics investigations. Such reversals may be relatively infrequent, but they do happen. *See, e.g.*, OLC, *Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities* (May 23, 1994); Daniel Koffsky, Memorandum for Stephen D. Potts,

Second, the standards of supervisory review implicit in OPR's Report would cripple efficiency among managing government attorneys. Under OPR's interpretation of the ethics rules, OLC heads like Judge Bybee will be hesitant to rely on the legal research of even the most credentialed staff attorneys. If there are any "problems … apparent in the analysis," he or she will be compelled—on pain of professional reprimand—to return to the drawing board (even if vital national security operations are disrupted at the last minute), double-check every citation, and independently research every area of law to make sure no relevant cases or counterarguments are missing. Report at 255, 257. This is untenable as a practical matter. OLC is confronted with complicated and controversial issues on a daily basis, and someone in Judge Bybee's position, with constant demands on his time, is not in a position to duplicate the work of his line attorneys, especially when American lives are at stake. In addition, OPR's insistence on the inclusion of countervailing views and exhaustive citation of applicable case law will cause future OLC memoranda to balloon in size. This would be in sharp contrast to OLC's current and past practice, which is to avoid the overwrought style of law review articles and instead give succinct opinions appropriate for their sophisticated clientele.

Third, if allowed to stand, OPR's novel application of ethical rules to OLC legal memoranda, far afield from its traditional role of investigating wrongdoing of *current* Department employees in actual *litigation*,[174] will simply invite partisan rancor and retribution, and perhaps bring OPR's own attorneys under scrutiny for the contents of its Report. *See, e.g.*, Paulsen Testimony at 6 ("[T]he suggestion that these memoranda lie outside the range of legal advice is *itself* a view of the applicable substantive law, and of the lawyer's professional role, so extreme and unreasonable as not to fall within the range of good-faith, objective, competent legal analysis." (emphasis in original)); Rotunda Letter at 4 ("My assessment of the draft report leads me to believe that the lawyers at OPR may themselves be guilty of disciplinary violations. … [T]hey are likely guilty of either gross incompetence or intentional deception."). Should OPR publish its Report, finalized in the early stages of a new administration and change in party, it would set a terrible precedent for presidential transitions and invite political retribution to settle past scores.[175] As Senator Kyl explained, "Last time I checked, as a lawyer, when you give legal advice to your client, you're not responsible for whether or not that advice is going to be disagreed with in some future administration.... If we get to the point where a lawyer cannot give, even if later people believe it to be incorrect, legal advice, then no administration is going to be safe in the future." Turner, *supra*; *see also* Joseph Williams, *Some Call for Bush*

Director, Office of Government Ethics, *Re: Applicability of 18 U.S.C. § 207(c) to the Briefing and Arguing of Cases in Which the Department of Justice Represents a Party* (Aug. 27, 1993) ("[W]e conclude that the January 1993 Memorandum was in error and instead return to the interpretation of section 207(c) that this Office took before that memorandum was written."). Particularly when, as in this instance, the author of one of the replacement OLC memos described the legal issues involved as "extremely difficult" and "among the most difficult [he had] ever tried to analyze," DOJ Hearing, Part II, at 7 (statement of Daniel Levin), OPR should tread cautiously in investigating and taking upon itself the review of previously-issued OLC opinions.

[174] *See* Appendix 13.

[175] The negative ramifications of OPR's decision would not be limited to the executive branch. Under OPR's view of D.C.'s rules of professional responsibility, attorneys for legislators could equally be at risk. For instance, the staff attorneys who prepared the recently-released Senate Armed Services Report on the treatment of detainees in U.S. custody failed, like OPR's Draft Report, to cite *Pierre*, the Third Circuit en banc case consistent with the Bybee Memo's view of specific intent. So, at the very least, the authors of that Report were misleading by failing to so much as acknowledge this significant authority.

Administration Trials, Boston Globe, Feb. 3, 2009 ("'If every administration started to reexamine what every prior administration did, there would be no end to it.'" (quoting Senator Arlen Specter)).

In sum, OPR has taken what is more properly a legal and policy debate and transformed it into a matter of professional performance. This will have, and already is having, grave consequences.

VIII. CONCLUSION

In reaching its conclusion, OPR did not consider the consequences of its decision to the Department, its employees (past, present, and future) or the country. Those issues may not be the primary concern for OPR. But they are no less real. And precisely because the improper use of ethics investigations to second guess the legal judgments of DOJ attorneys will have such prejudicial consequences for all involved, it is imperative that any review of OPR's findings focus not just on what they considered but what they failed to consider as well. We have, in OPR's Report, the poor execution of a bad idea. Judge Bybee served his country at a time of great need. And he did so honorably and ethically. But there will be other times of need. And others will be called upon to give difficult and perhaps even unpopular advice. As former Attorney Gneral Mukasey and Deputy Attorney General Filip concluded, rejection of OPR's flawed analysis is the right result not just for Judge Bybee, but for the Department of Justice and the country.

The Report's finding that Judge Bybee engaged in ethical misconduct is wrong as a matter of law and logic, questionable in its objectivity, and misguided as a matter of policy. But in order to find that Judge Bybee complied with his ethical obligations, DOJ need not resolve the myriad factual and legal issues presented. In fact, they are a distraction. Application of the proper ethical standard to the undisputed facts is all that is required. Under a proper interpretation of the relevant D.C. Rules of Professional Conduct, as confirmed by Professor Hazard, Judge Bybee was only required to:

- Provide his "honest assessment" of the law (Hazard Letter ¶ 15);
- Exercise sufficient diligence to provide answers to unsettled issues of law that were not "clearly outside the bounds of plausible legal judgment" (*Id.* ¶ 3); and
- Provide the client with information adequate to permit "an informed decision," which does not require an exposition of counter-arguments (*Id.* ¶¶ 10, 11).

In addition, OPR's own standards require proof of scienter. They establish that:

- "[A]n attorney who makes a good faith attempt to ... comply" with his obligations "does not commit professional misconduct." OPR Analytical Framework ¶ B(4).

OPR either concedes or does not contest the following operative facts:

1. Judge Bybee honestly believed the conclusions reached in the Bybee Memos (Report at 256);

2. OPR did not determine that the conclusions were wrong, let alone "implausible" (Report at 160);

3. John Rizzo, who served as a key client representative, fully recognized that the issues were difficult, the answers were uncertain, and that the CIA did not expect or need additional disclosures about risks to make its decision (Rizzo Letter ¶¶ 1, 4);

4. Judge Bybee's deputies concurred in his decision to issue the memos and no one involved in the review process urged him not to do so (Sections II.B, D, *supra*); and

5. Judge Bybee acted in good faith (Report at 256).

Thus, resolution of this case does not actually require you to agree or disagree with OPR's analysis of the memos. OPR's apparent conclusion that Judge Bybee violated D.C. Rule 2.1 can be reversed on the basis of facts that OPR does not dispute. Alternatively, even if you were to assume that some aspect of Judge Bybee's performance of his responsibilities fell below the standard of care, OPR's conclusion that he acted with the requisite scienter can also be reversed on the basis of facts that OPR does not dispute. We urge you to adopt either of these simple, unassailable conclusions and find that Judge Bybee did not engage in professional misconduct.

APPENDICES

Statements

1. Letter from Maureen Mahoney to John Rizzo (Oct. 5, 2009) ("Rizzo Letter")
2. Declaration of Timothy Flanigan (May 2, 2009) ("Flanigan Decl.")
3. Declaration of Daniel Levin (Apr. 29, 2009) ("Levin Decl.")
4. Letter from Geoffrey C. Hazard, Jr. to Maureen E. Mahoney (Oct. 7, 2009) ("Hazard Letter")
5. Letter from Ronald D. Rotunda to Miguel Estrada (Oct. 7, 2009) ("Rotunda Letter")
6. Michael Stokes Paulsen, *The Lawfulness of the Interrogation Memos* at 4 (May 13, 2009) (written testimony before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary) ("Paulsen Testimony")
7. Alan B. Morrison, *Alas, No Disciplinary Action*, National L. J., Aug. 17, 2009
8. Stuart Taylor, Jr., *Torture: Stop Harassing the Lawyers*, National Journal, Sept. 12, 2009
9. Saul Jay Singer, *Letter to the Editor: Don't Kill All the Lawyers*, Wash. Post, May 11, 2009

Ethics Rules

10. D.C. Rules of Professional Conduct 1.1, 1.4, and 2.1
11. OPR Analytical Framework (2005) ("OPR Analytical Framework")
12. OPR Policies and Procedures (2008) ("OPR Policies and Procedures")
13. Examples of OPR Investigations, from OPR Annual Reports (1994 – 2006)

Opinions

14. Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act*, at 1 (Sept. 15, 1995) ("*Shiffrin 1995 Opinion*")
15. Letters for John. A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Daniel B. Levin, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 6, Aug. 26, Sept. 6, and Sept. 20, 2004)
16. Memorandum for Commander, Joint Task Force, from Diane E. Beaver, Staff Judge Advocate, *Re: Legal Brief on Proposed Counter-Resistance Strategies* (Oct. 11, 2002) ("Beaver Memo").

Summaries

17. Examples of OLC Opinions Not Citing *Youngstown*
18. Examples of Language Qualifying and Narrowing the Bybee Memo
19. Examples of Officials Concurring in the Legality of Waterboarding

APPENDIX 18

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

QUALIFICATIONS/CAUTIONS IN BYBEE MEMO

INTRODUCTION	• "We conclude by examining **possible**[1] defenses that would negate any claim that certain interrogation methods violate the statute." (1) • "In Part III, we analyze the jurisprudence of the Torture Victims Protection Act … to predict the standards that courts **might follow** in determining what actions reach the threshold of torture in the criminal context." (2) • "[T]hese cases demonstrate that **most often** torture involves cruel and extreme physical pain." (2) • "In Part V, we discuss whether Section 2340A **may** be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers. We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A **may** be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war." (2) • "We conclude that, under the current circumstances, necessity or self-defense **may** justify interrogation methods that might violate Section 2340A." (2)
SPECIFIC INTENT	• "**As a theoretical matter**, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent." (4) • "While **as a theoretical matter** such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present." (4) • "Therefore, when a defendant knows that his actions will produce the prohibited result, a jury **will in all likelihood** conclude that the defendant acted with specific intent." (4) • "Although a defendant **theoretically** could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is **highly unlikely** that a jury would acquit in such a situation." (5) • "As we explained above, a jury **will be permitted to infer** that the defendant held the requisite specific intent." (5)

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[1] All emphases added unless noted otherwise.

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

SEVERE PAIN	• "Although these statutes address a **substantially different subject** from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain." (6) • "These statutes **suggest that** 'severe pain,' as used in Section 2340, must rise to a similarly high level." (6) • "**One might argue** that because the statute uses 'or' rather than 'and' in the phrase 'pain or suffering' that 'severe physical suffering' is a concept distinct from 'severe physical pain.'" (6 n.3) • "It **could be argued** that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm." (8) • "To be sure, **one could argue** that this phrase applies only to 'other procedures,' not the application of mind-altering substances." (10) • "The phrase 'disrupt profoundly the sense of personality' is not used in mental health literature nor is it derived from elsewhere in U.S. law." (11) • "These examples, of course, are **in no way intended to be an exhaustive list**. Instead, they are merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that 'disrupt[s] profoundly the senses or the personality.'" (11-12) • "The **legislative history** of Sections 2340-2340A **is scant**." (12)
RATIFICATION HISTORY	• "To be sure, the text of the treaty requires that an individual act 'intentionally.' This language **might be read** to require only general intent for violations of the Torture Convention." (15 n.7) • "To be sure, it **might be thought significant** that the Bush administration's language differs from the Reagan administration understanding." (18) • "**While it is true that there are rhetorical differences** between the understandings, both administrations consistently emphasize the extraordinary or extreme acts required to constitute torture." (18) • "Ultimately, whether the Reagan standard would have been even higher is a **purely academic question** because the Bush understanding clearly established a very high standard." (19)

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

CASELAW	• "There are **no reported cases** of prosecutions under Section 2340A." (22) • "Given the highly contextual nature of whether a set of acts constitutes torture, we have set forth in the **attached appendix** the circumstances in which courts have determined that the plaintiff has suffered torture, which include the cases from which these seven acts are drawn. **While we cannot say with certainty** that acts falling short of these seven would *not* constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law." (24) (last emphasis in original) • "Despite the limited analysis engaged in by courts, a recent district court opinion provides some assistance in predicting how future courts **might** address this issue." (24) • "[*Mehinovic*] demonstrates that courts **may be willing** to find that a wide range of physical pain can rise to the necessary level of 'severe pain or suffering.'" (26) • "[*Mehinovic*] illustrates that a single incident can constitute torture." (26) • "Although decisions by foreign or international bodies are **in no way binding** authority upon the United States, they provide **guidance** about how other nations will **likely** react to our interpretation of the CAT and Section 2340." (27) • "[The *Israel* decision] is still **best read** as indicating that the acts at issue did not constitute torture." (30)
COMMANDER-IN-CHIEF	• On its face, the Memo does not apply to all interrogations, but was limited to interrogations of "battlefield combatants" that were "ordered" *by the President* in the exercise of *his* constitutional duties: o "Section 2340A, as applied to interrogations of enemy combatants **ordered by the President** pursuant to his Commander-in-Chief power would be unconstitutional." (39) o "**The President** has the constitutional authority to **order** interrogations of enemy combatants" and "Congress can no more interfere with **the President's conduct** of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield." (31, 39) o "Any effort by Congress to regulate the interrogation of **battlefield combatants** would violate the Constitution's sole vesting of the Commander-in-Chief authority **in the President**." (39) o "Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional **if** it impermissibly encroached on **the President's** constitutional power to conduct a military campaign." (31)

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

COMMANDER-IN-CHIEF - Continued	• The Memo provides a way to avoid the constitutional problem: "Accordingly, **we would construe** Section 2340A to **avoid this constitutional difficulty**, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority." (35) • The Memo also presents a contrary view: "**It could be argued** that Congress enacted 18 U.S.C. § 2340A with full knowledge and consideration of the President's Commander-in-Chief power, and that Congress intended to restrict his discretion in the interrogation of enemy combatants." (36)
DEFENSES	• "Even if an interrogation method, however, **might arguably** cross the line drawn in Section 2340, and application of the statute was not held to be unconstitutional infringement of the President's Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses **might be available** that would **potentially** eliminate criminal liability. Standard criminal law defenses of necessity and self-defense **could** justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens." (39) • "Although **there is no federal statute** that generally establishes necessity or other justifications as defenses to federal criminal laws, the Supreme Court has recognized the defense." (40) • "The necessity defense **may** prove especially relevant in the current circumstances." (40) • "It appears that under the current circumstances the necessity defense **could** be successfully maintained in response to an allegation of a Section 2340A violation." (40) • "Of course, the strength of the necessity defense **depends on the circumstances** that prevail, and the knowledge of the government actors involved, when the interrogation is conducted. While every interrogation that might violate Section 2340A does not trigger a necessity defense, we can say that certain circumstances **could** support such a defense." (41) • "Legal authorities identify an important **exception** to the necessity defense." (41) • "**One could argue** that [the CAT's definition of torture] represented an attempt to [] indicate that the good of [] obtaining information—no matter what the circumstances—could not justify an act of torture." (41 n.23)

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

DEFENSES – Continued	• "Under the current circumstances, we believe that a defendant accused of violating Section 2340A **could have, in certain circumstances,** grounds to properly claim the defense of another.... Whether such a defense will be upheld **depends on the specific context** within which the interrogation decision is made." (43) • "**To be sure**, this situation is different from the usual self-defense justification ...."(44) • "[A]s *Neagle* **suggests**, ... a government defendant, acting in his official capacity, **should** be able to argue...." (45) • "[W]e conclude that a government defendant **may** also argue that his conduct of an interrogation, **if properly authorized**, is justified on the basis of protecting the nation from attack." (45) • "[W]e believe that [a government defendant] **could** argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack. This national and international version of the right to self-defense **could supplement and bolster** the government defendant's individual right." (46)
CONCLUSION	• "Further, we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers **may be** unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense **could** provide justifications that would eliminate any criminal liability." (46)

THE BYBEE MEMOS ADEQUATELY DISCLOSED RISKS AND UNCERTAINTIES

QUALIFICATIONS/CAUTIONS IN CLASSIFIED BYBEE MEMO

- "Our advice is based on the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, **and this opinion is limited to these facts**. If these facts were to change, this advice would not necessarily apply." (1)
- "Moreover, you have also orally informed us that although some of these techniques may be used [] more than once, that **repetition will not be substantial** because the techniques generally lose their effectiveness after several repetitions." (2)
- "We also understand that a **medical expert** with SERE experience **will be present** throughout this phase and that the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm to Zubaydah." (4)
- "As we explained in the Section 2340A Memorandum, 'pain and suffering' as used in Section 2340 **is best understood** as a single concept, not distinct concepts of 'pain' as distinguished from 'suffering.'" (11)
- "Even when all of these methods are considered combined in an overall course of conduct, they still would not inflict severe physical pain or suffering. As discussed above, a number of these acts result in no physical pain, others produce only physical discomfort. You have indicated that these acts **will not be used with substantial repetition**, so that there is no possibility that severe physical pain could arise from such repetition." (11)
- "**It may be argued** that, focusing in part on the fact that the boxes will be without light, placement in these boxes would constitute a procedure designed to disrupt profoundly the senses." (13)
- "When these acts are considered as a course of conduct, **we are unsure** whether these acts may constitute a threat of severe physical pain or suffering." (15)
- "Without more information, **we are uncertain** whether the course of conduct would constitute a predicate act under Section 2340(2)." (16)
- "Good faith **may be established** by, among other things, the reliance on the advice of experts." (16)
- "As we indicated above, a good faith belief **can** negate this element." (17)
- "Because you have conducted the **due diligence** to determine that these procedures, either alone or in combination, do not produce prolonged mental harm, we believe that you do not meet the specific intent requirement necessary to violate Section 2340A." (18)
- "We wish to emphasize that this is our **best reading of the law**; however, you should be aware that there are no cases construing this statute, just as there have been no prosecutions brought under it." (18)

APPENDIX 19

Executive Branch Lawyers Who Concurred In The Conclusion That Waterboarding As Proposed By The CIA Is Not Torture Under 18 U.S.C. § 2340A*

2002 - 2008

John Ashcroft, Attorney General

Alberto Gonzales, White House Counsel & Attorney General

Larry Thompson, Deputy Attorney General

James B. Comey, Deputy Attorney General

Jay Bybee, Assistant Attorney General, Office of Legal Counsel

Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel

Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel

Michael Chertoff, Assistant Attorney General, Criminal Division

Timothy Flanigan, Deputy White House Counsel

David Addington, Legal Counsel to the Vice President

Scott W. Muller, General Counsel, Central Intelligence Agency

John Bellinger, Legal Adviser to the National Security Council

John Rizzo, Acting General Counsel, Central Intelligence Agency

John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel

Patrick Philbin, Deputy Assistant Attorney General, Office of Legal Counsel

[redacted]

Adam Ciongoli, Counselor to the Attorney General

* Supporting citations are provided at Response Section II.D. This is a partial list.

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Tab A: Letter from Professor Ronald Rotunda to Miguel Estrada (October 7, 2009)
Tab B: Testimony of Professor Michael Stokes Paulsen (May 13, 2009)
Tab C: Testimony of Professor John Yoo (June 26, 2008)

The comments below are submitted on behalf of Professor and former Deputy Assistant Attorney General for the Office of Legal Counsel (OLC) John C. Yoo in response to the Office of Professional Responsibility's (OPR) Report dated July 29, 2009 entitled "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" ("Final Report"). For the reasons set forth below, Professor Yoo respectfully requests that the Department of Justice set aside the findings of the Final Report and reject OPR's recommendation that Professor Yoo be referred to the Pennsylvania bar for possible sanction.[1]

I. Introduction

In its 261-page report, which took nearly five years to draft, OPR does not once conclude that Professor Yoo gave incorrect legal advice on any of the enhanced-interrogation techniques on which the Executive Branch sought OLC's advice. OPR does *not* contend that any of those techniques—including waterboarding—amount to torture under U.S. law. Nor could it. The lawfulness of *each* technique has been confirmed by every subsequent OLC opinion on the issue, until the current administration took office and withdrew the relevant opinions without offering any legal analysis demonstrating that the techniques are *un*lawful. Rather, OPR alleges that Professor Yoo violated a duty of "thoroughness, objectivity, and candor" because, in the tense wake of the September 11th attacks, and while being told by CIA experts that another massive attack appeared imminent, he did not provide a sufficient level of detail and nuance in the memoranda that provided background reasoning for the specific (and *correct*) advice given to the client. OPR cites no authority from any jurisdiction that supports imposing disciplinary sanctions for the sort of conduct that it has identified—failing to note past ambiguity in the law since resolved by the Supreme Court, for example, or using a "*see also*" when a "*cf.*" might have been more appropriate. Instead, OPR relies on non-legal standards drafted *after* Professor Yoo left OLC—including a document written by Clinton Administration lawyers to express their disagreement with Professor Yoo's work. This entire exercise reflects no credit on OPR, and, unless the Department rejects OPR's recommendation and conclusions, the Department's dedicated career attorneys will never again feel safe to give good-faith advice on controversial, disputed matters. The Department, and the public, will be the worse for it.

On virtually every major point, OPR misinterprets the law—from applying the disciplinary rules of the wrong jurisdiction, to ignoring the expired statute of limitations, to criticizing an interpretation of the torture statute that has been confirmed by an *en banc* court of appeals, to misapplying canons of statutory interpretation, to castigating Professor Yoo for failing to cite precedents that OLC memoranda rarely cite in analogous circumstances. Any neutral observer can see that what spurred this report was not any violation of disciplinary rules, but rather OPR's policy-based objections to the enhanced-interrogation program of the Bush Administration.

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[1] Professor Yoo respectfully adopts and incorporates herein Judge Bybee's response in its entirety. References herein to the Levin Declaration, the Flanigan Declaration, the Rizzo Letter, and the Hazard Letter refer to the documents attached as exhibits to Judge's Bybee's submission. References to May 4 Comments refer to the comments we submitted after receiving OPR's March draft report. References to the Rotunda Letter refer to the letter from Professor Ronald Rotunda dated October 7, 2009, and attached hereto under Tab A.

Indeed, it is difficult to read the report without concluding that OPR has lost sight of its proper role. Presumably it is not ordinarily the métier of OPR attorneys to decide whether our country's intelligence needs actually support particular covert activities, whether philosophical debates about "ticking bomb scenarios" are "based on unrealistic assumptions" that have "little, if any relevance to intelligence gathering in the real world," and whether "information" about "Abu Zubaydah, KSM, Al-Nashiri, or the other detainees subjected to EITs" sufficiently "approached the level of imminence and certainty associated with the 'ticking bomb' scenario." F.R. at 212 n.168. OLC's job was to give legal advice based on the facts as presented by the Central Intelligence Agency, not to assume the role (as OPR now has) of Junior Varsity CIA. OPR appears to think that the proper role of OLC attorneys was to reweigh the operational facts adduced by the CIA and play roulette with the lives of thousands of Americans. If that does not show that this whole enterprise is woefully misdirected it is difficult to know what would. The fact is Professor Yoo gave correct legal advice in good faith, and under pressure that few will ever experience. That should be the end of the matter.

* * *

In March 2009, OPR provided to Professor Yoo an initial version of its report, which concluded that Professor Yoo, as well as former Assistant Attorney General for the Office of Legal Counsel and now Court of Appeals for the Ninth Circuit Judge Jay S. Bybee, violated the District of Columbia Rules of Professional Conduct through their work on detainee interrogation in the aftermath of September 11, 2001 ("Draft Report").[2] As a result of its findings, OPR concluded that Professor Yoo and Judge Bybee should be referred to their respective bar authorities for possible sanction.

The Draft Report took more than four years longer to produce than OLC was afforded to write its memoranda on unprecedented and enormously consequential questions during a time of war and uncertainty, yet it was a remarkably incompetent and biased work, which surely would embarrass OPR and the Department were it ever to receive critical public scrutiny. It was presented to Attorney General Mukasey and Deputy Attorney General Filip on December 23, 2008, with a statement that OPR intended to make it final and public on January 12, 2009, without any opportunity for the subjects of the investigation to review and comment on OPR's findings—an opportunity that not only is customary but also had been promised expressly by OPR to Professor Yoo. *See* January 19, 2009 Letter from Attorney General Mukasey and Deputy Attorney General Filip to OPR Counsel H. Marshall Jarrett ("Mukasey Letter"), at 1.

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[2] Applying OPR's terminology, the relevant documents include the August 1, 2002 "Bybee Memo," the August 1, 2002 "Classified Bybee Memo," the August 1, 2002 "Yoo Letter," and the March 14, 2003 "Yoo Memo." OPR does not independently analyze the Yoo Memo, focusing rather on the Bybee Memo and the Classified Bybee Memo (collectively the "Bybee Memos") and the Yoo Letter, based on its conclusion that "[t]he Yoo Memo incorporated the Bybee Memo virtually in its entirety," and "Yoo subsequently incorporated the substance of the Yoo Letter into the Yoo Memo." F.R. at 76, 238 n.196; *see also id.* at 159 n.125 ("Yoo's March 14, 2003 memorandum to Haynes incorporated the Bybee Memo in its entirety, with very few changes. Thus, our conclusions with respect to the Bybee Memo, as set forth below, apply equally to the Yoo Memo."). Professor Yoo therefore addresses the Yoo Memo in the context of his discussion of the Bybee Memos and the Yoo Letter.

Attorney General Mukasey and Deputy Attorney General Filip—two highly respected former federal judges who did not join the Department until after Professor Yoo and Judge Bybee had left—strenuously objected to OPR's analysis and conclusions, and criticized OPR's extraordinarily suspicious timing and process. They also specifically requested that their letter be made public in the event that OPR's conclusions are affirmed: "to the extent the Department would ultimately make any bar referrals, at the conclusion of the internal review by Department leadership offices, we ask that this letter be included in any version of the final Report forwarded to bar authorities or released to Congress or the public." *Id.* at 2.

OPR waited for Attorney General Mukasey and Deputy Attorney General Filip to leave office before reissuing its Draft Report in March 2009, again with a view toward its expeditious publication. This time, at the insistence of the Office of the Deputy Attorney General, OPR did make the Draft Report available for comment to Professor Yoo and Judge Bybee. The principal thrust of the Draft Report was that Professor Yoo and Judge Bybee violated D.C. Rule of Professional Conduct 1.1 by providing "incompetent" legal advice in the interrogation memoranda. The Draft Report also alleged, albeit secondarily, that Professor Yoo and Judge Bybee violated D.C. Rule 2.1, because their advice "did not represent independent legal judgment or candid legal advice." This latter conclusion—which Attorney General Mukasey and Deputy Attorney General Filip had found "even more unconvincing than any proposed conclusion under Rule 1.1," *see* Mukasey Letter at 10—derived primarily from OPR's view that it is impermissible for an attorney to have the client's perspective and desired outcome in mind while rendering advice.

It would take far too long to catalog here the many factual and legal errors that underlay the Draft Report's conclusions. In fact, OPR insisted on a narrow time frame for review—making it literally impossible to address every inaccuracy in the Draft Report. Even so, Professor Yoo and Judge Bybee submitted nearly 140 pages of single-spaced specifics on numerous glaring errors in that Draft Report.

OPR took three months to rewrite its report in light of our comments, and to deliver the same to the Deputy Attorney General as a July 29, 2009 Final Report. Unlike the Draft Report, the Final Report at least strives for a patina of doctrinal rigor, albeit one that it acquired from our (and Judge Bybee's) detailed comments pointing out the many ways in which the Draft Report had not even achieved that. But the Final Report, at bottom, variously ignores or papers over almost all of the substantial errors in OPR's earlier draft, and stands by its erroneous conclusion that Professor Yoo and Judge Bybee should suffer grave sanction for Bush Administration anti-terrorism policies that were vetted by the most senior attorneys at the Department of Justice and other Executive Branch agencies.

As was the case with the Draft Report, Professor Yoo's ability to comment on OPR's work has been significantly limited. Although much of the Draft Report was unclassified, the Final Report remained completely classified for the nine weeks that were allotted for our review—though OPR purportedly wrote the report for the express purpose of releasing it to the public. Because our review and drafting were required to occur entirely in a Department of Justice SCIF, and on a computer provided by the Department there, the circumstances do not provide a fair opportunity to comprehensively address every error in the Final Report. Yet many glaring errors can be readily identified:

- In order to apply the D.C. Rules of Professional Conduct, the Draft Report erroneously relied on a choice-of-law provision in OPR's regulations that applies only to lawyers practicing before *a court*. OPR has now cited the correct provision, which requires the application of the Pennsylvania rules, but misinterprets the relevant choice-of-law provision of Pennsylvania in order to get back to the D.C. rules, which it believes more favorable to its theory. Under the indisputably applicable Pennsylvania rules, a professional misconduct finding under OPR's theory is completely foreclosed.

- Whatever rules supply the substantive *standards* that governed Professor Yoo's advice to the President in 2002 and 2003, OPR cannot reasonably dispute that only Pennsylvania—the *sole* bar of which Professor Yoo is a member—possesses any authority to impose *discipline* on him. But Pennsylvania imposes a four-year statute of limitations, which expired long ago, on any complaint that may be filed against Professor Yoo. The Final Report advances *no* theory for believing (or even arguing) that its referral to the Pennsylvania bar would be timely.

- OPR appears to have abandoned the primary theory that underlay the Draft Report—*viz.*, that Professor Yoo rendered "incompetent" legal advice in square violation of Rule 1.1—presumably because (among many other reasons) the rules make clear that no such violation can be found for giving correct legal advice. Of course, OPR even now says that it "did not attempt to determine and did not base [its] findings on whether the Bybee and Yoo Memos arrived at a correct result." F.R. at 160. The Final Report, instead, rearranges all of the Draft Report's picayune criticisms of the interrogation memoranda as purported violations of Rule 2.1. To do so, it invents its own standards under the rule, adopting as *ethical* rules guidelines developed after the fact by partisan critics. Indeed, OPR adopts "as guidance" the so-called "Principles to Guide the Office of Legal Counsel," a document prepared by leading Democrats who served in OLC during the Clinton Administration in order to voice their disapproval of the Bush Administration's interrogation policies.

- The Draft Report did not even mention the critical requirement of scienter, which is unambiguously imposed, as a prerequisite to any misconduct finding, by OPR's own policies and procedures. In fact, OPR apparently admitted to Attorney General Mukasey that it lacked any direct evidence that Professor Yoo and Judge Bybee acted with anything but utmost good faith. Mukasey Letter at 5 & n.3, 10, 14. Yet in utterly backward fashion, the Final Report now includes a new section at the end that asserts, based on such minutiae as Professor Yoo's use of a "*See also*" signal with which OPR disagrees, that he *intentionally* gave sanctionable advice. OPR makes no effort to explain its initial error and *ex post* rationalization.

- In its Draft Report, OPR failed to consider the extraordinary facts and circumstances as they existed in the immediate aftermath of the worst terrorist attack in the Nation's history, as the rules of professional conduct require. OPR now gives passing mention to the fact that "the Bybee Memo was written at a difficult time in our nation's history," F.R. at 254, but otherwise continues to ignore the facts and circumstances then existing. OPR instead skews its report to deemphasize the extreme terror threat and intelligence-gathering exigencies that existed in the aftermath of September 11, 2001, and emphasize "*jus cogens* norms" of international law, which it acknowledges as the entire "premise" of its analysis. F.R. at 24. OPR continues to engage in egregiously one-sided Monday-morning quarterbacking with grave implications for dedicated public servants.

- In its Draft Report, OPR failed even to *cite* an *en banc* decision of the U.S. Court of Appeals for the Third Circuit that adopted the same interpretation of the torture statute's specific-intent requirement as the Bybee Memo. OPR has hardly done better in the Final Report, briskly dismissing the relevance of that decision on the ground that it postdates the Bybee Memo, despite the fact that the ten-judge majority employed precisely the legal reasoning that OPR believes Professor Yoo should be sanctioned for. In the same vein, OPR ignores a D.C. Circuit decision that defined "severe" pain as pain causing "agony" that is "intense, lasting, or heinous," while criticizing the Bybee Memo for setting a similarly high threshold.

The list of similar additional errors is long. On top of its superficial "fixes," OPR also retains in the Final Report inflammatory and irrelevant facts about actions that Professor Yoo never analyzed and OLC never authorized. Such seriously misleading writing, tailor-made for cable-news sound bites, is unworthy of the Department.

For good measure, OPR has denied Professor Yoo any access to the factual materials on which OPR relied, apart from Professor Yoo's own interview transcripts. The reader must simply take OPR's word that the testimony of witnesses and the content of documents are fairly represented by the Final Report, without any selection bias. That seems unlikely in the extreme, at least judging from OPR's work in the Draft Report and Final Report.[3] The Draft Report, which OPR was prepared to publish in January 2009, was full of errors that would shame a law student. When those were pointed out to OPR, however, it simply invented new arguments, manufactured a new theory of misconduct, and camouflaged its errors. That OPR would do so while accusing Professor Yoo of engaging in results-driven advocacy that lacked professional candor is sadly ironic.

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[3] To cite but one example, OPR rips out of context Professor Yoo's response to an OPR hypothetical on whether the President might make a tactical decision in war to "massacre" a village pursuant to his Commander-in-Chief power. F.R. at 64. OPR obviously includes this snippet in an effort to shock the reader and to make clear to all right-thinking people that Professor Yoo is a bad man, indeed. Of course, OPR provides none of the relevant context, in

The Final Report is a coolly crafted libel of Professor Yoo's reputation, made all the worse because there is no forum in which Professor Yoo will be able to clear his good name in accordance with the most rudimentary procedural protections. Pennsylvania, the only state bar with disciplinary authority over him, lacks jurisdiction because OPR blew the statute of limitations. And, even if that state were to undertake an inquiry, reviewing bar officials would very likely be denied the critical classified context necessary to consider the propriety of the erroneous allegations OPR has made against Professor Yoo and Judge Bybee. This is extraordinarily objectionable. And it would be similarly objectionable—and utterly irresponsible—for the Department of Justice to make public a summary or redacted Final Report including a finding of professional misconduct when those conclusions are drawn from classified materials and facts incapable of public scrutiny or use by Professor Yoo in his own defense.[4]

The Department should put a stop to this. OPR is free to side with commentators who disagree with the legal analysis that Professor Yoo and other OLC attorneys made during the last presidency, and it has identified with the benefit of time and nearly five years worth of scholarly commentary some areas in which Professor Yoo and Judge Bybee might have made their work-product better. But the referral for professional sanction of dedicated public servants because of piddling critiques and good-faith disagreements on difficult legal questions would be an act of immense injustice.

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which Professor Yoo gave the example of President Truman's use of the atomic bomb on Hiroshima and Nagasaki, and explained that the "parade of horribles" offered by the OPR investigators did not answer the relevant separation-of-powers question being discussed. *See* July 11, 2005 Yoo Tr. at 117-20; *id.* at 119 (Professor Yoo: "[Y]ou're right. It could lead to all kind of parade[s] of horribles. You know, you could say, look, there was a legitimate use of the Commander-in-Chief power when President Truman decided to nuke, you know, two Japanese cities. And that was a terrible thing."); *id.* at 120 (Professor Yoo: "I don't think the parade of horribles answers the Constitutional question, because I could easily . . . flip them all and say Congress [instead of the President] ordered them to do it. And then you would say, well, Congress shouldn't have that power. That's such a bad result."). This excerpt is emblematic of OPR's selective use of sources, the true extent of which cannot be known by Professor Yoo or his counsel in light of OPR's steadfast refusal to make available the primary materials on which it relies.

[4] And the fact that pressure has been applied by legislators who would use OPR's considerable authority for political gain should not change the calculus. *See, e.g.*, March 31, 2009 Press Release from Senators Sheldon Whitehouse and Dick Durbin (noting their letter to the Department of Justice objecting to Professor Yoo's being afforded the opportunity to comment on OPR's Draft Report); Sheldon Whitehouse, *Official Torture*, NATIONAL LAW JOURNAL (Aug. 31, 2009) (accusing "lawyer Yoo" of "legal malpractice"). In fact, under *Pillsbury Co. v. FTC* and its progeny, such legislative interference with agency investigations and decision-making processes has long been held to violate the due process rights of those affected. 354 F.2d 952, 964 (5th Cir. 1966); *see also, e.g.*, *Esso Std. Oil Co. v. López-Freytes*, 522 F.3d 136, 148 (1st Cir. 2008).

Department attorneys should not be subject to bar referral based solely on OPR's subjective assessment of their legal analyses where those analyses are made in good faith and are not objectively wrong. The implications for following such a path are grave indeed, and are sure to cause irreparable harm to the Department.[5]

II. OPR's Erroneous Misconduct Conclusions Are Foreclosed By Binding Pennsylvania Authority.

OPR accuses Professor Yoo of failing to thoroughly discuss contrary authority in advising the President on complex, unprecedented questions of statutory, constitutional, and international law in the tense environment following September 11, 2001. Yet, in advising the Attorney General to find that Professor Yoo violated standards of professional conduct, OPR itself not only fails to identify weaknesses in its case, but, unlike Professor Yoo, unquestionably reaches the wrong conclusions on relatively simple questions of law. OPR's abject failure to interpret correctly the relevant law—or even to *attempt* to do so—unmasks its report as an exercise in political scapegoating, not "thorough, objective, and candid" legal advice.

OPR begins by applying the wrong substantive law to this case. In the Draft Report, OPR ignored its own regulation, which required it to apply the rules of Professor Yoo's "state of licensure," Pennsylvania, not the District of Columbia. It is difficult to understand how a body whose charge it is to assess the legal competence of other attorneys could not have managed, after four years, to stumble upon the correct provision of its *own* regulation. Now that we have apprised OPR of its error, OPR at last cites the correct provision of the regulations, but then blatantly misreads both the Pennsylvania and D.C. choice-of-law provisions to get back to the D.C. rules. OPR is wrong. The standards of conduct that apply are those of Pennsylvania, not the District of Columbia, and there is no plausible argument—OPR certainly advances none—that Professor Yoo violated Rule 2.1 as it existed in Pennsylvania at the relevant time.

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[5] As former Attorney General Mukasey and Deputy Attorney General Filip eloquently observed (after noting that there is no evidence that Professor Yoo or Judge Bybee acted in anything but good faith in discharging their duties):

> [It is] impossible to believe that government lawyers called on in the future to provide only their best legal judgment on sensitive and grave national security issues in the time available to them will not treat [bar referrals for Professor Yoo and Judge Bybee] as a cautionary tale—to take into account not only what they honestly conclude, but also the personal and professional consequences they might face if others, with the leisure and benefit of years of hindsight, later disagreed with their conclusions. Faced with such a prospect, we expect such lawyers to trim their actual conclusions accordingly. Nor, if the recommendation of professional discipline stands, could the Department reasonably be expected to readily attract, as it does now, the kinds of lawyers who could make such difficult decisions under pressure without the lingering fear that if those decisions appear incorrect when reconsidered, not only their conclusions but also their competence and honesty might be called into question. OLC lawyers might be willing to subject themselves to the inevitable public second-guessing of their work that occurs years later in a time of relative calm. But we fear that many might be unwilling to risk their future professional livelihoods.

Mukasey Letter at 14.

For good measure, OPR has committed one of the cardinal sins of professional incompetence: blowing a statute of limitations. OPR waited to release its report until 2009, after supposedly investigating this matter for almost five years. Although OPR's purported area of expertise is the ethical rules of the several states in which Department of Justice attorneys are licensed, and although at least two OPR attorneys responsible for the Draft Report are themselves members of the Pennsylvania bar, it apparently never occurred to anyone at OPR—until we mentioned it in our response to the Draft Report—that OPR's delay might allow the statute of limitations for disciplinary complaints in that state to run. Which it did: Pennsylvania's four-year statute of limitations has expired and so Professor Yoo may not be disciplined. Even after being told about this, however, OPR has pushed ahead without even seriously—dare we say thoroughly—addressing the issue. Indeed, the Final Report would appear to mark the first time in its history that OPR has referred a *former* Department attorney to a state body that *lacks jurisdiction* to investigate OPR's allegations.

A. Under Both The D.C. And Pennsylvania Choice-of-Law Rules, Pennsylvania Rules Apply To Professor Yoo.

In the Draft Report, OPR chose to apply the D.C. Rules of Professional Conduct. It based that selection on 28 C.F.R. § 77.4(a). But, as we pointed out in our initial comments, § 77.4(a) refers only to Department attorneys practicing before a particular *court*; it is totally irrelevant to lawyers, like Professor Yoo, who give advice to the Executive Branch.

We therefore informed OPR that the applicable provision of the OPR regulations is § 77.4(c)(1), which says that "[w]here no case is pending, the attorney should generally comply with the ethical rules of the attorney's *state of licensure*, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought." 28 C.F.R. § 77.4(c)(1) (emphasis added). Without acknowledging its earlier error, OPR has now at least gone through the motions of citing § 77.4(c)(1). *See* F.R. at 20. But OPR has now replaced its failure even to identify the correct regulation with a most cursory and equally incompetent choice-of-law analysis.

On OPR's view, because *current* Pennsylvania Rule 8.5(b) requires the application of the rules of the jurisdiction where "the predominant effect" of the lawyer's conduct occurred, and because it is supposedly unclear (to OPR) where that would be in this case, the proper course is to apply the D.C. Rules. F.R. at 20. This reasoning has no other purpose than to get back to the D.C. Rules, which OPR perceives as more favorable to its disciplinary arguments. But there are three fatal problems with it.

First, OPR (again) applies the wrong choice-of-law provision. The Pennsylvania Rules had a different choice-of-law provision before May 2004, during Professor Yoo's service at OLC. That provision said:

> In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: . . . (2) for any [conduct not in connection with a proceeding before a court or agency]: (i) *if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction*, and (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Pa. R. Prof. Conduct 8.5(b) (2003) (emphasis added). Professor Yoo has never been admitted in a jurisdiction other than Pennsylvania. Under the plain text of the *applicable* Pennsylvania choice-of-law provision, then, Professor Yoo is subject only to the Pennsylvania Rules.

Second, even if the current Pennsylvania Rule 8.5(b) applied here, and it does not, Professor Yoo would not be subject to the D.C. Rules. The current Pennsylvania Rule 8.5(b) says that for any conduct not "in connection with a matter pending before a tribunal . . . the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." Pa. R. Prof. Conduct 8.5(b)(2) (2008).[6] The effects test includes foreign jurisdictions, because comment [7] explains that "[t]he choice of law provision applies to lawyers engaged in transnational practice." Nothing in this rule supports OPR's apparent belief that it can default to the jurisdiction "in which the lawyer's conduct occurred" simply because OPR cannot be troubled to undertake the primary inquiry required by the text (the locus of the "predominant effect"), or, more likely, because that inquiry would not produce a jurisdiction with rules that Professor Yoo could be said to have violated.[7]

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[6] The rule also includes a critical safe-harbor provision: "[a] lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Pa. R. Prof. Conduct 8.5(b)(2).

[7] Here, *all* relevant memos advised about the legality of interrogation techniques to be used in *other countries*. *See, e.g.*, Bybee Memo at 1 ("As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States."); Yoo Memo at 1 ("legal standards governing military interrogations of alien unlawful combatants held outside the United States.").

Third, the D.C. Rules themselves *never* apply to lawyers not licensed to practice in D.C. and not appearing before a D.C. court:

> If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and (ii) If the lawyer is licensed to practice *in this and another jurisdiction*, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

D.C. R. Prof. Conduct 8.5(b)(2) (emphasis added). Nowhere does this choice-of-law provision permit the application of the D.C. Rules to lawyers not licensed to practice in the District of Columbia.

That was by design. As recently as four years ago, the D.C. bar explained that "[i]n contrast [to the ABA Model Rules], the D.C. Rule, like the former version of the Model Rule, requires application of the rules of a jurisdiction in which the lawyer is licensed to practice." District of Columbia Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to the District of Columbia Rules of Professional Conduct* at 10 (Oct. 6, 2005).[8] *See also* Rotunda Letter at 2; Daniel Joseph & Heather Bupp-Haboda, *Guide to New Rules of Ethics* (March 2007).[9] D.C. adopted this approach specifically because of the difficulty of applying the "predominant effect" test—the very ground that OPR cites in *favor* of applying the D.C. Rules. *See id.* ("The model rule appears to be of difficult application, because of the lack of guidance of what 'predominant effect' means and of the difficulty in knowing where some conduct occurred. . . . Much of what a lawyer may do on a particular matter is performed in multiple places.").[10]

In short, OPR got the choice-of-law analysis dead wrong. Neither Pennsylvania nor D.C. would apply the D.C. Rules to this case, and the default under the relevant federal regulation is the rules of the attorney's state of licensure. The Pennsylvania Rules apply.

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[8] http://www.dcbar.org/inside_the_bar/structure/reports/rules_of_professional_conduct_review_committee/rpcreport.cfm.

[9] http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/march_2007/newrules.cfm

[10] The D.C. bar has also expressly disavowed any disciplinary authority over lawyers not admitted to practice in D.C. The ABA's Model Rule 8.5(a) includes this sentence: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." The D.C. Rules purposefully *omit* that sentence. *See also* Joseph & Bupp-Haboda, *Guide to New Rules*, *supra* ("Although a D.C. lawyer may be subject to discipline in a number of jurisdictions, the D.C. Rules do not envision that such discipline can reach lawyers not admitted to practice in the District of Columbia.").

B. Under The Applicable Pennsylvania Rules, OPR's Analysis Leads To An Entirely Different Conclusion.

As the foregoing analysis shows, OPR should have applied the Pennsylvania Rules, not the D.C. Rules. And under the version of Pennsylvania Rule 2.1 in effect at the time the interrogation memoranda were drafted—which included a critical difference from D.C. Rule 2.1—Professor Yoo unquestionably did not commit professional misconduct.

The first sentence of D.C. Rule 2.1 states that "[i]n representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice" (emphasis added), just as does ABA Model Rule 2.1. Rules cast with the term "shall" are "imperatives," and such rules "define proper conduct for purposes of professional discipline." D.C. Rules, "Scope." *Accord* Pa. Rules, "Scope." At the time in question, however, Pennsylvania had *not* adopted ABA Model Rule 2.1 as written. Instead, Pennsylvania had altered the Model Rule to state that "[i]n representing a client, a lawyer *should* exercise independent professional judgment and render candid advice." Pa. Rule 2.1 (2003) (emphasis added).[11]

This difference is of enormous significance for determining whether rules of professional responsibility have been violated. In Pennsylvania, as elsewhere, rules "cast in the term 'may' or 'should', are *permissive* and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. *No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.*" Pa. Rules, "Scope" (emphasis added). *Accord* D.C. Rules, "Scope." OPR itself recognizes this fact in discussing the second sentence of D.C. Rule 2.1, which states that "[i]n rendering advice, a lawyer *may* refer not only to law but to other [extralegal] considerations. . . ." As OPR correctly notes, "[b]ecause the rule's language . . . is permissive . . . a lawyer's decision not to provide such advice should not be subject to disciplinary review." F.R. at 21 n.23.

Because the language in *both* sentences of Pennsylvania Rule 2.1 was "permissive" at the time Professor Yoo served at OLC, as a matter of law an alleged failure to follow that rule *cannot* provide a basis for disciplinary review. That is why when the New York bar proposed a Rule 2.1 with the same permissive language, it explained that the "variation from the ABA rule, which uses the command 'shall,' is consistent with . . . the intention that Rule 2.1 is not to be enforced through the disciplinary process." Committee on Standards of Attorney Conduct, *Proposed New*

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[11] By order dated August 23, 2004, Pennsylvania adopted the mandatory "shall" language for Rule 2.1, but that revised standard is not relevant here given that the conduct in issue occurred in 2002 and 2003.

York Rules of Professional Conduct.[12] OPR is therefore foreclosed from arguing that any "violation" of the version of Rule 2.1 actually applicable to Professor Yoo can be cited to support a finding of professional misconduct.

Now that OPR has dropped its contention that Professor Yoo's advice was so incompetent as to independently violate D.C. Rule 1.1, *see infra* Section III.B, OPR's conclusion that Professor Yoo violated D.C. Rule 2.1 is essential to the Final Report's recommendation that discipline be imposed on him. Since OPR applied the wrong Rule 2.1, and since the correct rule is not enforceable through discipline, OPR's conclusion has no basis in law.

C. Because OPR Delayed Completing Its Report For Nearly Five Years, Disciplinary Action Against Professor Yoo Is Barred By The Pennsylvania Disciplinary Board's Statute Of Limitations.

Even if OPR were correct that D.C. standards of conduct must be used to assess the adequacy of Professor Yoo's legal advice (and it is not), it is indisputable that the Pennsylvania bar is the only bar with disciplinary authority over him. Referral of Professor Yoo for potential disciplinary action must therefore comply with the rules for disciplinary complaints promulgated by Pennsylvania. For attorneys admitted to the Pennsylvania bar, alleged violations of the rules of professional conduct are subject to a four-year statute of limitations (regardless of what substantive law applies to measure the quality of the attorney's conduct). Pa. Disciplinary Bd. R. 85.10(a) ("The Office of Disciplinary Counsel or the Board *shall not* entertain any complaint arising out of acts or omissions occurring more than four years prior to the date of the complaint, except as provided in subsection (b).") (emphasis added).

Professor Yoo's "acts or omissions" related to his work on the Bybee Memos and Yoo Letter ended on August 1, 2002, while his work on the Yoo Memo ended on March 14, 2003, shortly before he left the Department. The four-year statute of limitations for any professional misconduct related to these memos thus expired on July 31, 2006, and March 13, 2007—*more than two years ago*. As a result, allegations of professional misconduct related to this work are untimely under the rules of the Pennsylvania Disciplinary Board, and may not be investigated by the Pennsylvania bar.

Rule 85.10 itself sets forth the only situations in which tolling of the four-year statute is permitted.[13] Subsection (b)(2) expressly sets out the situations for which tolling applies: The limitations period is "tolled during any period when there has been litigation pending that has resulted in a finding that the subject acts or omissions involved civil fraud, ineffective assistance of counsel or prosecutorial misconduct by the respondent-attorney." This provision does not remotely apply here.[14]

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[12] http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home&Template=/CM/ContentDisplay.cfm&ContentFileID=2809

[13] Subsection (b)(1) of Rule 85.10 says that the four-year limitations period does not apply "in cases involving theft or misappropriation, conviction of a crime or a knowing act of concealment." Those exceptions are not relevant to this case.

Given the expiration of the statute of limitations, the Department should consider carefully the implications of sending any adverse findings to the Pennsylvania bar, for at least two reasons. First, with no legitimate point to be served by the referral of any such findings, this exercise would, quite correctly, subject OPR and the Department to charges of partisan gamesmanship. Second, if OPR's conclusion actually were valid—which it manifestly is not—then OPR has itself exhibited extraordinary incompetence by allowing the statute of limitations to expire despite working on this investigation for approximately *two years* before that deadline came and went. Allowing a limitations period to run is, of course, a quintessential act of incompetence subject to bar discipline. *See, e.g., In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007).

Although the statute of limitations issue becomes irrelevant if the Department reaches the correct and just substantive result here, that is not the case if the Department goes forward with the erroneous conclusion in the Final Report. The failure of OPR to complete its investigation in a sufficiently timely manner, or alternatively to seek tolling agreements, has already been greeted by public criticism. *See* Jan Crawford Greenburg, "Tortured Timing," ABCNews.com (May 6, 2009) ("[I]f Yoo—who wrote the memos and has been vilified as responsible for approving the interrogation program—can't be disciplined under state bar rules, why then would OPR even refer the matter to state bar officials in the first place?"). The Department's decision to recommend disciplinary charges that cannot be lawfully brought would be a huge mistake that will serve only to damage institutional and public confidence in OPR's and the Department's impartiality, processes, and basic competence.

OPR dismisses this fundamental error in a footnote. *See* F.R. at 20 n.21. According to OPR, its job is "not to assist state bars in enforcing their rules," but rather "to ensure that Department attorneys adhere to the highest ethical standards." *Id.* But that rationale rings hollow in this case, because Professor Yoo is no longer a Department attorney; indeed, he left the Department long before OPR even *commenced* its investigation. There is literally *no* rationale for OPR's advisory opinion other than to feed a bitter partisan dispute by defaming Professor Yoo. And its transparent rationalization will fool no one. OPR took over four years to produce a Draft Report riddled with basic legal errors. Every attempt that has been made to point out OPR's errors—by Attorney General Mukasey, by Deputy Attorney General Filip, and by the subjects of the investigation—have been taken by OPR solely as an opportunity to reshuffle the rationalizations offered in support of the single-minded conclusion with which OPR began the investigation—that Professor Yoo and Judge Bybee are guilty of professional misconduct. The arguments in support of this conclusion keep evolving, but the predetermined outcome is immune to reason. Given that OPR's basic complaint is that Professor Yoo lacked candor and "thoroughness" because he wished to support a specific policy outcome, the irony of the situation will scarcely need additional comment to cause great harm to the Department.

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[14] Because the Rule itself addresses tolling, there is no authority for engrafting additional tolling based on general equitable principles. But even if such principles somehow were deemed to apply, there would be no grounds for tolling in this case. Pennsylvania courts recognize equitable tolling in two situations: (1) "[i]f . . . through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry; . . . [or] (2) "if the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period." *Schaffer v. Larzelere*, 189 A.2d 267, 269–70 (Pa. 1963). The first exception obviously does not apply here. Nor does the second. The Bybee Memo was publicly released in June 2004, and therefore the Pennsylvania Board could have reasonably ascertained any of the alleged disciplinary infractions at that time. Moreover, since at least that date OPR could have alerted the Pennsylvania disciplinary board to open an investigation into Professor Yoo's conduct. But it did not.

Moreover, it would be extraordinarily unethical for the Department to endorse OPR's recommendations when they can never be acted upon through the disciplinary process. Rotunda Letter at 2. Because there can be no adjudicatory proceeding in which Professor Yoo could argue his case publicly with the full protections of due process and judicial review, endorsing OPR's Report will unfairly tarnish his reputation.

Such an action runs contrary to the Department's longstanding commitment to protecting the privacy of individuals who are investigated but not tried. The Department, for example, does not include the names of uncharged co-conspirators in indictments unless absolutely necessary. *See* U.S. Attorney's Manual § 9-11.130 ("In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments."). That obligation arises out of "[t]he Due Process Clause of the Fifth Amendment," which "protects an individual from government accusations of criminal misconduct without providing a proper forum for vindication." *Doe v. Hammond*, 502 F. Supp. 2d 94, 101 (D.D.C. 2007); *see also United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1049 (N.D. Cal. 2005) ("The underlying policy for redacting an unindicted coconspirator's name from an indictment is to avoid the 'very real stigmatization' that they might suffer. . . . [N]aming them serves no purpose other than to publicly smear the individual who 'has not been provided a forum in which to vindicate his rights.'" (internal citations and quotation marks omitted)).

A similar concern for fairness underlies the grand-jury secrecy rule. "A cornerstone" of that rule is "the protection of the reputations and well-being of individuals who are subjects of grand jury proceedings, but who are never indicted." *In re Am. Historical Ass'n*, 62 F. Supp. 2d 1100, 1103 (S.D.N.Y. 1999); *see also Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 219 (1979) ("[B]y preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule."). Such persons, like Professor Yoo, would have no forum to refute the government's allegation of wrongdoing if their names were disclosed.

Unfortunately, a steady stream of leaks surrounding OPR's Draft Report has already needlessly and shamefully harmed Professor Yoo.[15] And the detailed, specific nature of the leaked information—together with the descriptions of the reporters' sources—overwhelmingly suggest that the sources of the leaks are OPR employees, or individuals within the Department of Justice who have reviewed personally the investigation's tentative results.[16] Indeed, shortly after the new administration took office, one of the first reporters to publicize the leaked information, Michael Isikoff, sought comment from Professor Yoo in an email that on its face asserted that "Marshall Jarrett's folks"—*i.e.* OPR attorneys—were unhappy with Attorney General Mukasey's refusal to endorse OPR's conclusions—and thus strongly suggested a source in or close to OPR. (We previously provided a copy of Mr. Isikoff's email to the Office of the Deputy Attorney General.) These leaks presumably are unauthorized, because OPR's Policies and Procedures contemplate that OPR's findings "may be publicly disclosed" only when OPR's investigation is "final," and "after all available administrative reviews have been completed." OPR Policies and Procedures ¶ 12.[17] Of course, the news reports cited above plainly refer to OPR's report on OLC attorneys as a "draft," and the leaks would therefore seem to be a blatant violation of OPR policy. Worse yet, if the unnamed sources are attorneys—as they are likely to be—the leaks appear to violate those lawyers' duty to maintain client confidentiality. *See* ABA Model R. Prof. Conduct 1.6. It is certainly the case that these leaks seem to be far clearer violations of professional ethical norms than anything reflected in the Final Report.

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[15] *See, e.g.*, Terence Chea, *Bush Attorneys Who Wrote Terror Memo Facing Backlash*, ASSOCIATED PRESS (May 10, 2009); Carrie Johnson, *Bush Officials Try to Alter Ethics Report*, WASH. POST (May 6, 2009); David Johnston and Scott Shane, *Interrogation Memos: Inquiry Suggests No Charges*, N.Y. TIMES (May 6, 2009); Michael Isikoff, *A Torture Report Could Spell Big Trouble For Bush Lawyers*, NEWSWEEK (Feb. 23, 2009).

[16] *See* Chea, *Bush Attorneys*, *supra* ("The draft report from an internal Justice Department inquiry sharply criticizes Mr. Yoo and Mr. Bybee and recommends referring their cases to state bar associations for possible disciplinary actions, a person familiar with the inquiry said. The person spoke on condition of anonymity because he was not authorized to discuss the inquiry."); Johnson, *Bush Officials Try to Alter Ethics Report*, *supra* (noting that "sources . . . spoke on the condition of anonymity because the process is not complete"); Johnston and Shane, *Interrogation Memos*, *supra* ("An internal Justice Department inquiry has concluded that Bush administration lawyers committed serious lapses of judgment in writing secret memorandums authorizing brutal interrogations but that they should not be prosecuted, according to government officials briefed on its findings. . . . The conclusions of the 220-page draft report are not final and have not yet been approved by Attorney General Eric H. Holder Jr. The officials said that it is possible that the final report might be subject to further revision but that they did not expect major alterations in its main findings or recommendations."); Isikoff, *A Torture Report Could Spell Big Trouble for Bush Lawyers*, *supra* ("According to two knowledgeable sources who asked not to be identified discussing sensitive matters, a draft report was submitted in the final weeks of the Bush Administration [that] sharply criticized the legal work of two former top officials—Jay Bybee and John Yoo . . . .").

[17] OPR's Policies and Procedures, Analytical Framework, and Annual Reports are available at http://www.usdoj.gov/opr/other_opr_docs.htm.

Moreover, the leaked material appears to be protected by the Privacy Act. *See* 5 U.S.C. § 552a. None of the exceptions to the Privacy Act's ban on disclosure of protected information appears to apply here, *see id.* § 552a(b), meaning the Department could be liable for civil monetary damages (and attorney's fees) should the targets of OPR's investigation bring suit for the apparent violation of their Privacy Act rights, *see id.* § 552a(g)(4). And the sources of the leaks may also be guilty of a crime: Department officers and employees who violate the Privacy Act are "guilty of a misdemeanor" and are subject to criminal penalties. *See id.* § 552a(*i*)(1). In light of these facts, it is apparent that a more appropriate subject of professional conduct investigation would be the individuals within OPR or the Department responsible for these shameful and malicious leaks.

Finally, even apart from the Department's obligation not to publicly accuse Professor Yoo of professional misconduct when it knows that he will have no way to clear his name, the Department would also violate basic tenets of professional ethics by referring him to an adjudicatory body that it *knows* has no power to act. D.C. Rule of Professional Conduct 3.1 says: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ." The same standard is used to assess Rule 3.1 violations as sanctions under Rule 11 of the Federal Rules of Civil Procedure. *See* James W. MacFarlane, *Frivolous Conduct Under Model Rule of Professional Conduct 3.1*, 21 J. Legal Prof. 231, 233 & nn.8–10 (1996) (citing G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.1:301 (1985 & Supp. 1997)). And it is well-known that an attorney may be sanctioned under Fed. R. Civ. P. 11 for filing a complaint when the attorney knows or should know that the statute-of-limitations period has expired. *See, e.g.*, *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997); *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll. of Pa.*, 103 F.3d 294, 299 (3d Cir. 1996); *Cargile v. Viacom Int'l, Inc.*, 282 F. Supp. 2d 1316, 1319–20 (N.D. Fla. 2003). Referring Professor Yoo to the Pennsylvania Disciplinary Board, then, puts OPR attorneys in danger of violating their own ethical obligations under Rule 3.1 (or an analogous rule in their states of licensure). It is difficult to see why the Department would authorize such a course, where OPR has never so much as proffered an *argument*, much less a meritorious one, for believing its referral would be timely.

III. OPR Has Applied An Utterly Improper Heightened Standard To Assess Professional Misconduct.

OPR contends that Professor Yoo intentionally violated a *sui generis* professional standard that OPR has derived from three sources: (1) D.C. Rule of Professional Conduct 2.1, "Advisor" (as purportedly informed by D.C. Rule 1.1, "Competence")[18]; (2) a May

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[18] In the Draft Report, OPR addressed Rule 1.1 independently. In the Final Report, however, OPR considers Rule 1.1 as it is "relevant" to its Rule 2.1 analysis. F.R. at 22. This shift is apparently in response to criticisms of OPR's own competence, the inapplicability of Rule 1.1 where the advice given is correct and does not prejudice the client, and the fact that Rule 1.1 does not fit easily into OPR's new-found theory that Professor Yoo acted with "intent" to violate the

16, 2005 memorandum by Steven Bradbury entitled "Best Practices for OLC Opinions" ("Best Practices Memo"); and (3) a December 21, 2004 document by Walter Dellinger, Dawn Johnsen and other former OLC attorneys from the Clinton Administration entitled "Principles to Guide the Office of Legal Counsel" ("Principles Memo"). F.R. at 15–24. OPR rests its recommendations that Professor Yoo and Judge Bybee face disciplinary sanction on the heightened hybrid standard of "thoroughness, objectivity, and candor" that it has created by amalgamation from these sources. *See, e.g.*, F.R. at 11, 251 (finding individual responsibility for violations "of the standards of thoroughness, objectivity, and candor"); *see also, e.g., id.* at 160, 175, 192, 193, 201, 220, 226, 227, 234, 236, 237, 254, 255, 257, 260.

Of course, under OPR's own Analytical Framework, Professor Yoo must have violated a "known, *unambiguous* obligation" for OPR to recommend bar referral. F.R. at 18 (emphasis added); *see also* OPR Analytical Framework ¶ B(3). But nowhere in the Final Report does OPR identify such an unambiguous obligation. No D.C. disciplinary case has found a lack of thoroughness to be sanctionable where the advice given was not prejudicial to the client. The D.C. Rules nowhere mention objectivity (which evidently means to OPR that legal analysis should be undertaken without knowing a client's preferred course of action). And there is no authority for the proposition that a lawyer's honest assessment of the law can form the basis for a violation of the duty of candor. No doubt recognizing these problems, OPR custom-designs its standard to fit its version of the facts—that Professor Yoo, while not necessarily providing incorrect legal advice and while certainly giving his honest opinion, did not imbue the legal memoranda on which he worked with enough caveats and nuance.

But that is not all. Unsure that it has adequately rigged the standard to guarantee its preordained outcome, OPR further ups the ante, requiring the "*highest* degree of thoroughness, objectivity, and candor." F.R. at 11 (emphasis added). Again, OPR cites no case articulating such a heightened standard or sanctioning an attorney on the ground that he did not meet the "highest degree" of professional conduct. OPR's only basis for this aspect of its "known, unambiguous obligation" is its own assertion that "Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standards of professional conduct." F.R. at 25. OPR's made-up standards do not withstand scrutiny.

A. The Steven Bradbury "Best Practices" Memo And Dawn Johnsen "Principles Memo" Are After-The-Fact, Non-Binding, And Aspirational Documents That Cannot Form The Basis For A Finding Of Professional Misconduct.

OPR resorts to the Best Practices Memo and the Principles Memo because "the reported decisions and professional literature provided little guidance for application of the [Model Rule 2.1] standard in this context." F.R. at 22. OPR's citation of these

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rules of professional responsibility (*i.e.*, while OPR's theory is that Professor Yoo intentionally gave advice unduly supportive of his client's policy goals, it recognizes that it cannot plausibly maintain an independent argument that Professor Yoo was "intentionally incompetent").

documents as a basis for recommended professional sanction is absurd. Professor Yoo could not have relied upon or been bound by these documents when he worked on the Bybee Memos in 2002 and Yoo Memo in 2003 because they did not yet exist. In fact, the Principles Memo was drafted by a number of lawyers who served in OLC during the Clinton Administration, well after Professor Yoo had left the Department, to criticize the Bush Administration's policies in the war on terror, including the use of enhanced interrogation techniques. *See* Dawn E. Johnsen, *Guidelines for the President's Legal Advisors*, 81 Ind. L.J. 1345, 1346, 1348 (2006) (introducing the Principles Memo and explaining that "what inspired the drafting of the document" was the authors' desire to "restore" OLC's role in "promoting presidential adherence to the rule of law"). Similarly, the Best Practices Memo was drafted only well after the memoranda were written.

Whatever their provenance and intent, the one thing that is clear is that these are aspirational "best practices," not the type of the minimum standards for which bar sanction might attach. And OPR's own policies allow a finding of professional misconduct only when an attorney intentionally or recklessly violates an "*unambiguous obligation* imposed by law, rule of professional conduct, or Department regulation or policy." F.R. at 18; *accord* OPR Analytical Framework at 3 ("An attorney intentionally violates an obligation or standard when he or she (1) engages in conduct with the purpose of obtaining a result that the obligation or standard *unambiguously* prohibits, or (2) engages in conduct knowing its natural or probable consequence and that consequence is a result that the obligation or standard *unambiguously* prohibits. . . ." (emphases added)). No such unambiguous obligation (or even binding standard) is found in the aspirational, after-the-fact documents on which OPR rests its conclusions.

Moreover, OPR's use of the documents is selective. For example, even the Principles Memo recognizes that OLC does not exist simply to "predict a legal outcome" in court as OPR suggests, F.R. at 24, but rather recognizes that:

> OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law.

Principles Memo at 3. Moreover, the Principles Memo makes clear that "OLC *must* take account of the administration's goals and assist their accomplishment within the law." *Id.* at 5 (emphasis added); *accord* Levin Decl. ¶ 8 ("In my experience, in crafting legal advice, OLC attorneys are generally aware of the course of action the client wishes to take, especially in areas that raise questions involving national security. In my opinion, it is appropriate for OLC to determine whether there is a legal way for the client to undertake actions the client believes to be important for national security reasons."). Even Professor Yoo's most vocal critics from the Clinton Administration OLC would agree that the work of the office need not be completely "objective," then, as OPR implausibly asserts on the basis of no authority whatsoever. Rather, OLC quite properly takes the President's policy objectives into account when giving advice.

Additionally, notwithstanding OPR's apparent belief that the *ex-post* Best Practices Memo demonstrates that it has been OLC's practice from time immemorial to discuss all possible counterarguments to its legal conclusions, *see, e.g.*, F.R. at 24, Steven Bradbury, who authored that memorandum, informed counsel that this has *not* been OLC's past practice, and that many past OLC opinions say little about opposing arguments. Bradbury also confirmed that the Best Practices Memo was not intended to describe the ethical duties of OLC attorneys, and that his statement that the memo "reaffirm[s] traditional practices" of OLC, F.R. at 15, does not apply to every aspect of the memo, including the treatment of counterarguments. A review of past OLC opinions in fact confirms that thorough treatment of counterarguments has not been the traditional practice of the Office, and the Best Practices Memo itself is written in tentative language: "[i]n general, we *strive* in our opinions for . . . a balanced presentation of arguments on each side of an issue . . . taking into account all reasonable counterarguments." Best Practices Memo at 3 (emphasis added). To "in general, . . . strive" for this result is a fine goal—but such a "best practices" pronouncement certainly does not establish a "minimum standard" for determining whether a Department attorney has violated his ethical duties, especially when the aspirational goal has not been the uniform past practice of the Office, much less of the legal profession generally. *Cf.* F.R. at 24 (noting OPR's task to determine whether "*minimum* standards" were met (emphasis added)).

B. OPR's Heightened Standard Of "Thoroughness, Objectivity, and Candor" Has No Basis In The Rules Of Professional Conduct.

Recognizing that its reliance on the Best Practices and Principles Memos cannot withstand critical scrutiny, and that it cannot establish a violation of any particular rule of professional conduct on the rule's own terms, OPR carefully calibrates a new heightened standard to reach its preordained result. To do so, it plucks "candor" from D.C. Rule 2.1, "thoroughness" from D.C. Rule 1.1, and blindfolded "objectivity" from a source known only to OPR's attorneys. Of course, OPR cites no authority for this line-blurring hedge, which it has apparently pursued in the hopes of reducing its burden under the individual rules. But the practical result is that OPR must demonstrate an independent, sanctionable violation of *both* rules for the conclusions reached under its hybrid approach to stand. OPR has not, and cannot, make such a showing.

1. Rule 2.1

The central conclusion of the OPR Report is that Professor Yoo and Judge Bybee violated the Rule 2.1 duty of candor, which is "not simply aspirational." F.R. at 17. As discussed above, however, this is an unquestionably erroneous conclusion under the controlling Pennsylvania standard applicable to Professor Yoo, which at the relevant time clearly provided that Rule 2.1 was only permissive. And OPR has recognized, as it must, that where a standard's language is permissive, an attorney's alleged failure to follow the standard "should not be subject to disciplinary review." F.R. at 21 n.23. To an impartial arbiter, that should end the case. But even if OPR were somehow correct that Rule 2.1 was (as to Professor Yoo) a mandatory requirement subject to bar sanction, OPR has not come close to demonstrating that Professor Yoo violated the rule here.

The first sign of OPR's overreaching is its inability to identify any persuasive or binding precedent finding misconduct for a violation of Rule 2.1. Given that Rule 2.1 was a permissive standard in Pennsylvania at all relevant times, it is unsurprising that OPR was unable to find any Pennsylvania authority subjecting an attorney to discipline under the rule. But even on the assumption that D.C. Rules apply, what is more curious is that OPR was unable to find a single case from D.C. *or any other jurisdiction* that would support its theory here. OPR admits that "the reported decisions and professional literature provided little guidance for application of the [Model Rule 2.1] standard in this context," F.R. at 22, but disregards the natural conclusion that the complete absence of any precedent whatsoever suggests their invocation of the rule is inappropriate.

In the absence of any relevant authority, OPR has elected not to apply Rule 2.1 faithfully. The comment to Rule 2.1, which OPR at least manages to cite, recognizes that "[a] client is entitled to straightforward advice expressing the lawyer's *honest* assessment." F.R. at 21 (emphasis added); *see also* Rotunda Letter at 2–3; Hazard Letter at 4. But nowhere does OPR show, or attempt to show, that Professor Yoo did not provide his honest assessment of the law, much less acted in bad faith. To the contrary, OPR notes that "John Yoo has vigorously defended his work since leaving the Department," F.R. at 4 n.1, and it evidently admitted to Attorney General Mukasey that it lacked any direct evidence that Professor Yoo acted in bad faith. And those who have commented on whether Professor Yoo gave his honest assessment of the difficult issues that he addressed in the memos have steadfastly maintained that he did. *See, e.g.*, Levin Decl. ¶ 7 ("In my view, the authors believed what they wrote. Over the years I had a number of discussions with Mr. Yoo and I never had any reason to believe that he did not set forth his honest assessment of these difficult questions."); Rizzo Letter ¶ 2 ("[I] have never doubted that the conclusions reflected Jay Bybee's and John Yoo's honest assessment of the legal issues they addressed."); J. GOLDSMITH, THE TERROR PRESIDENCY 167 (2007) ("[Yoo] has defended every element of the opinion to this day, and I believe he has done so in good faith."); C. Savage & S. Shane, *Terror-War Fallout Lingers Over Bush Lawyers*, N.Y. TIMES (Mar. 9, 2009), at A1 (paraphrasing Columbia Law Professor Daniel C. Richman for the proposition that discipline is "unlikely unless e-mail messages or early drafts turn up proving that they blatantly altered their legal conclusions to fit a policy agenda . . . [T]hat would be unlikely for Mr. Yoo, who had pushed an aggressive theory of presidential power long before the administration recruited him."); *cf.* OPR Analytical Framework ¶ B(4) ("An attorney who makes a good faith attempt to . . . comply with the[] [obligations and standards imposed on the attorney] in a given situation does not commit professional misconduct."). OPR thus does not even attempt to make the case, required by Rule 2.1, that Professor Yoo gave anything less than his honest assessment, because he emphatically did.

Instead, OPR just rewrites the standard by introducing the word "objective" without explanation. *Compare*, F.R. at 11, 24 *with* F.R. at 21–24. Of course, a lawyer is required to be "objective" in the sense that he must offer his true belief about the answer to a particular legal question—which Professor Yoo unquestionably did. But since OPR sees "objectivity" as a requirement separate from both "candor" and the "duty to exercise independent legal judgment," OPR must mean something other than the "honest assessment" called for by Rule 2.1. *See* F.R. at 11 ("[W]e concluded that [Yoo] committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.").

What OPR seems to mean by "objective" is that OLC lawyers, much like a judicial tribunal, must draft legal opinions in a vacuum, completely tone-deaf to the interests of their Executive Branch client. *See, e.g.*, F.R. at 227 (OPR "found evidence that the OLC attorneys were aware of the result desired by the client"). In this case, the client's paramount interest, as OLC well understood, was the urgent need to implement an interrogation program considered vital to preventing potentially imminent terrorist attacks. OLC was not asked to "predict a legal outcome," as OPR evidently believes, *compare* F.R. at 24 *with* Principles Memo at 3, but simply to determine whether the interrogation program could be legally justified. The Executive Branch client did not want an opinion about whether a court or commentator might someday question the legality of the interrogation program, and certainly not on the wisdom or morality of the techniques at issue, but rather on whether, in OLC's opinion, the program violated the torture statute. Professor Yoo answered that question honestly, and OPR has produced no evidence or argument that he did not. But under the banner of "objectivity," OPR appears to assert that Professor Yoo should have supplemented his good-faith interpretation of the statute with a protracted on-the-one-hand, on-the-other-hand digression that the client did not ask for. *See* F.R. at 24 ("[A] thorough discussion of the law should include the strengths and weaknesses of the client's position and should identify any counter arguments." (citing legal-writing books)); Rizzo Letter ¶ 1 ("[I] did not ask OLC to provide an exhaustive memorandum that thoroughly discussed all possible counterarguments," but rather "sought OLC's best judgment about the correct answer to a difficult question of law.").

That proposition has no support in the text of Rule 2.1 or its comments, which require only an "honest assessment." Rotunda Letter at 2–3; Hazard Letter at 4. It also ignores the fact that Justice Department lawyers are ethically bound (again, on the assumption that D.C. Rules apply) to "counsel or assist [their] client"—the Executive Branch—"to make a good-faith effort to *determine* the validity, *scope, meaning, or application of the law*," D.C. R. Prof. Conduct 1.2(e) (emphases added), and to respect the President's "decisions concerning the objectives of representation," *id.* R. 1.2(a). The "client has ultimate authority to determine the purposes to be served by legal representation." *Id.* cmt. [1]. Thus, if the Executive Branch requests an interpretation of a statute, and an opinion assessing the legality under that statute of specific actions it plans to take, OLC lawyers are ethically bound to determine the "meaning . . . of the law" and to opine on the issue presented or the legality of the proposed course of action, as requested. *Cf.* D.C. R. Prof. Conduct 2.1 cmt. [3] ("A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value.").

As discussed above, longstanding OLC practice makes clear that in matters of executive authority and otherwise the Office is not divorced from the policy goals of the President. Former OLC attorneys from both political parties have publicly written about OLC's obligation to answer specific legal questions posed by the President, even when—indeed, particularly when—the answers to those questions will obviously shape or further the President's policy goals. For example, Randolph D. Moss, who served as an Assistant Attorney General for OLC during the Clinton administration, conceived of the "extraordinarily unusual" factual circumstance that OPR believes arose here:

> The President might also make clear that *he intends to resolve a particular legal question, and, in that context, might seek input of whatever type he regards helpful*. He might, for example, *conclude that he believes a particular action is legally permissible, but seek the assurance of the Attorney General that she, at the very least, agrees that the argument he finds convincing is a reasonable one*. Such cases, however, are extraordinarily unusual, and the Department, accordingly, must typically assume that, when its legal views are sought, they will become the final view of the executive branch of government.

Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1318 (2000) (emphases added). Professor Nelson Lund, who served in OLC during the Reagan administration, agrees. He has written:

> Like clients in private practice, the President is responsible for his own decisions, and in fact he has the authority either to make his own legal determinations without consulting any particular lawyer or to proceed in the face of contrary advice from any lawyer he does consult. Accordingly, there is no obvious reason for him to have less freedom than private clients *to require from his lawyers the kind of legal advice he thinks will be most useful to him*. It is true that the President has legal obligations that are different from those of any private citizen, but they are *his* obligations, not those of his lawyers or other subordinates.

Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 Cardozo L. Rev. 437, 449 (1993) (first emphasis added) (internal footnotes omitted).

Given OLC's role, and the ethical obligations of OLC attorneys to respect their client's "ultimate authority to determine the purposes to be served by [OLC's] representation," *see* D.C. R. Prof. Conduct 1.2 cmt. [1], faulting Professor Yoo for interpreting § 2340A and assessing the legality of specific actions under that statute in the utmost good faith and in response to direct questions from the Executive Branch would constitute a vast departure from existing norms of legal practice. Doing so would conflate the role of OLC and the attorneys who serve there with the role of the President's myriad policy advisers.

Moreover, the audience for the memos was a sophisticated group of attorneys and policymakers who well understood that the questions were difficult and close, with moral, ethical, and political implications. These clients were also well aware of the difficulties in interpreting vague statutes, the separation-of-powers tensions that arise when the President exercises his authority as Commander in Chief, and the limitations and potential inapplicability of common-law defenses to statutory violations. The OLC attorneys were not asked to write a treatise discussing every possible argument, but to render a good-faith opinion addressing the ultimate issues. That is exactly what they did. That the attorneys appropriately kept in mind their client's responsibility to protect the Nation, as well as OLC's well-established tradition of preserving executive authority, is unremarkable. To suggest that doing so amounts to an ethical violation—without citing a single piece of supporting authority—is absurd and irresponsible.

2. Rule 1.1

In its Draft Report, OPR grounded the majority of its findings of substantive violations on the Rule 1.1 duty of competence. OPR based its standards of competence on entirely irrelevant sets of sources, such as the OLC Best Practices Memo that did not yet exist when Professor Yoo was at OLC, five books on legal research and writing (none aimed at identifying standards of bar discipline), and a handful of court decisions discussing solely in a *litigation* context what an attorney must do in writing a *brief*, focusing on how properly to persuade a court on behalf of a client. D.R. at 127–129. It also took goals clearly meant to be *aspirational* and converted them into *minimum* standards. And OPR ignored important comments to Rule 1.1 and the D.C. case law interpreting the rule.

As a result, we devoted a large portion of our initial comments to explaining that Professor Yoo had acted competently, reaching the correct legal conclusions on all of the issues in the Bybee Memo (and far surpassing the minimum level of competence). We also showed that OPR could not possibly meet the requirements of D.C. law, which precludes discipline even for failures of skill and knowledge unless those failures "constituted a serious deficiency in the representation," that is, generally the type of conduct "that prejudices or could have prejudiced a client and [that] was caused by a lack of competence." *In re Evans*, 902 A.2d 56, 69–70 (D.C. 2006) (quoting board report adopted by court). *See* May 4 Comments at 22–48.

In its Final Report, OPR has apparently abandoned its independent Rule 1.1 theory, focusing instead on its hybrid theory ostensibly arising out of Rule 2.1. That is no doubt because OPR reached *no* conclusion about whether the ultimate analysis in the memoranda was correct: "We did not attempt to determine and did not base our findings on whether the Bybee and Yoo Memos arrived at a correct result." F.R. at 160. As we explained in our initial comments, absent complete inattention a lawyer cannot be held to have given advice that is simultaneously incompetent and correct. *See* May 4 Comments at 23. Correct legal advice cannot prejudice a client, and OPR has shown no prejudice here.

Even a rudimentary review of judicial decisions applying Rule 1.1 would have demonstrated to OPR that lawyers have been disciplined under it only for egregious incompetence significantly prejudicing a client. *See, e.g.*, *In re Cole*, 967 A.2d 1264, 1265–66 (D.C. 2009) (lawyer failed to file timely asylum application for client and falsely told client that application had been filed); *In re Outlaw*, 917 A.2d 684, 686–88 (D.C. 2007) (lawyer allowed statute of limitations to expire); *In re Nwadike*, 905 A.2d 221, 226–27 (D.C. 2006) (lawyer failed to file a timely and complete discovery statement under D.C. Rule of Civil Procedure 26(b)(4)); *In re Cater*, 887 A.2d 1, 5, 16–17 (D.C. 2005) (lawyer delegated duties to nonlawyer employee, who then embezzled from incapacitated clients); *see also* Alan B. Morrison, *Alas, no disciplinary action*, NATIONAL LAW JOURNAL (Aug. 17, 2009) at 38 (noting that Rule 1.1 requires "'the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,'" but concluding that "there is no doubt that the lawyers who wrote the torture memos met those requirements").

Given Rule 1.1's requirement that a violation be prejudicial to the client, and OPR's apparent unwillingness or inability to refute the memos' conclusions, OPR is forced to subordinate its Rule 1.1 argument on its second go-around. But unwilling to completely let it go, OPR now tries, citing no legal precedent, to smuggle parts of the Rule 1.1 standard into Rule 2.1: "Relevant to Rule 2.1's duty to exercise independent professional judgment and render candid legal advice are the provisions of D.C. Rule 1.1." F.R. at 22. This sleight-of-hand allows OPR to cherry-pick the words "thoroughness" and "care" from Rule 1.1 and its comments and then import them into Rule 2.1. That has the effect of raising the bar for Rule 2.1, rendering even an attorney's "honest assessment" a violation if it is supported by supposedly insufficient thoroughness or care. But unlike Rule 1.1 proper, OPR's hybrid rule can apparently be violated even if the legal advice is correct and the client is not prejudiced. This sloppy, outcome-driven legal analysis does not itself meet a basic standard of competence.

OPR goes on to invoke its hybrid rule to accuse Professor Yoo of violating a duty of "thoroughness," despite Professor Yoo's ultimately correct analysis of the specific interrogation techniques at issue, because he supposedly did not cite enough contrary authority—in a memorandum drafted under extreme pressure and intended for a most sophisticated audience. *See, e.g.*, F.R. at 11, 251. In support of its approach, OPR further enhances its own manufactured standard by citing a *legal writing text* for the proposition that "[i]n legal memoranda or opinion letters that seek to predict a legal outcome, a thorough discussion of the law *should* include the strengths and weaknesses of the client's position and should identify any counter arguments." F.R. at 24 (emphasis added). But legal writing texts do not establish professional-responsibility standards, and there is no ethical requirement for thorough treatment of counterarguments in a legal opinion. Rotunda Letter at 3; Hazard Letter at 4. Moreover, the CIA "did not ask OLC to provide an exhaustive memorandum that thoroughly discussed all possible counter arguments," but rather sought "OLC's best judgment about the correct answer to a difficult question of law." Rizzo Letter ¶ 1. And, ironically, while it may be debatable whether OLC was "predict[ing] a legal outcome" in evaluating whether enhanced interrogation techniques violated the torture statute, it is certainly not subject to reasonable dispute that OPR is "predict[ing] a legal outcome" in evaluating whether Professor Yoo and Judge Bybee violated the standards of professional conduct so as to merit sanction by the jurisdiction of their licensure. Yet OPR gives no credence to counterarguments in its Final Report and presumably does not concede its own professional responsibility violations on this score.

Professor Yoo's conduct could not possibly amount to a violation of either Rule 1.1 (because he provided correct legal advice that was not prejudicial to his client) or Rule 2.1 (because he gave his honest assessment of the law). But OPR's prefabricated rule effectively permits it to find violations of Rule 1.1 without the showing of prejudice required by D.C. law, and violations of Rule 2.1 even for honest assessments.[19] And, as described elsewhere in this response, OPR itself *repeatedly* fails to cite contrary authority in a far more egregious way on far less difficult issues and with far more time to research. It is truly astounding that OPR condemns OLC lawyers for omitting contrary authority when OPR does so over and over again even *after* being apprised of it. If OPR's heightened competence standard had any merit, and were not tailor-made to attack Professor Yoo and Judge Bybee, any responsible official at the Department would be under an ethical duty to seek professional discipline for OPR's attorneys. *Quis custodiet ipsos custodes*?

C. There Is No Basis For OPR To Apply A "Super Standard" Of Professional Conduct In This Case.

OPR's entire analysis operates from the "premise" that "Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the ***highest*** standards of professional conduct." F.R. at 24–25 (emphasis added). In establishing this premise, OPR eschews its statement in the immediately preceding paragraph that it is only assessing "***minimum*** standards." *Id.* at 24 (emphasis added). And, apparently recognizing the risks inherent in applying an elevated professional standard, OPR expressly limits its analysis "to the particular circumstances of *this* case, which . . . involved issues of the highest importance that demanded the highest degree of thoroughness, objectivity, and candor from the lawyers involved." *Id.* at 11 (emphasis added). The logical leaps OPR must take to conclude that a heightened standard applies to Professor Yoo and Judge Bybee—and for this case only—reveal the pervasive bias that infects its analysis.

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[19] Moreover, to the extent the disciplinary rules address the level of explication that must attend an attorney's advice, the appropriate provision would appear to be D.C. Rule 1.4(b), which is nowhere mentioned (much less discussed) in OPR's analysis. That rule requires only that a lawyer "explain a matter to the *extent reasonably necessary* to permit the client to make informed decisions" (emphasis added). In fact, "[o]rdinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult." *Id.* cmt. [4]. No one could reasonably contend that OLC's opinions at issue failed to explain the issues to the extent "reasonably necessary" for the White House's and CIA's evaluation of the advice.

Apart from bias, adoption of this sort of analysis is fraught with danger for the Department and its dedicated attorneys. As a general proposition, no one disputes that the degree of care and attention that a matter requires should be commensurate with its importance. But much, if not all, of what the Department does is important, whether it is a capital case, a terrorism prosecution, an immigration matter, a Supreme Court argument, or advising the Attorney General on whether voting rights may be constitutionally extended by Act of Congress to the Nation's capital. Indeed, when federal prosecutors weigh whether to seek the death penalty, or to decline to prosecute a suspect who may have committed a violent crime and may do so again, they are making far more direct life-or-death decisions than Professor Yoo made in advising the actual policymakers about the legality of certain interrogation techniques. Yet no one has ever contended that those Department lawyers would be subject to anything other than the ordinary rules of professional conduct. *See* 28 C.F.R. § 77.1(c) (stating that 28 U.S.C. § 530B "imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but should not be construed to impose greater burdens on Department attorneys than those on non-Department attorneys").

The Department can derive cold comfort from the fact that OPR's newly minted super standard—"highest degree of thoroughness, objectivity and candor"—purports to reach only "*jus cogens* norms." Those peremptory norms of international law include not only torture, but also "genocide," "slavery," "prolonged arbitrary detention," and "systematic racial discrimination." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987). With a fraction of the inventiveness that OPR has brought to this investigation, much of what the Department does could be framed as an enforcement "policy" that involves a "derogation" of these norms.

Indeed, most reported cases on torture involve the Department's immigration attorneys advocating for a narrow definition of torture (and particularly the specific-intent requirement) in order to return aliens to a country where, it is claimed, they will in fact be tortured. The Department's civil-rights attorneys, who enforce laws against peonage and involuntary servitude (and, of course, racial discrimination) might likewise find themselves acting in derogation of "*jus cogens*" norms if they decline to prosecute every allegation that such an offense has occurred; in fact, it is not immediately apparent why any high-level decision to allocate greater prosecutorial resources to other enforcement priorities could not be characterize as a "policy" of derogating from those "norms." Similar arguments can be constructed about detention decisions by criminal-division attorneys, and, in particular, the Bureau of Prisons. Without going too far into hypotheticals, the Solicitor General is currently arguing, on behalf of the Administration, that the Bureau of Prisons can lawfully confine inmates whose incarceration sentences are at an end if they present certain dangerous tendencies. *See United States v. Comstock*, No. 08-1224. Is she acting "in derogation" of the *jus cogens* norm barring "prolonged arbitrary detention"?[20]

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[20] Of course, the fact that the Solicitor General is defending the constitutionality of an Act of Congress presumably would be considered as persuasive by OPR as the notion that OLC attorneys were safeguarding Executive authority. Even OPR would not maintain that its "*jus*

The Department also should be very concerned about any suggestion that a heightened standard of professional responsibility applies only to matters deemed important during OPR's after-the-fact review. The Department's attorneys are presumably held to the highest standards in *every* matter they handle, regardless of whether OPR takes interest or not. OPR's mandate is not to assess whether Department attorneys have met the great expectations placed upon them, and presumably the Department does not consult OPR when it comes time for merit promotions. To the contrary, OPR is charged with ensuring that Department attorneys meet *minimum* standards under established rules of professional conduct. *See* F.R. at 24. Under these rules, there is no "highest" standard of review based on OPR decree, and Department attorneys should not be forced to divine OPR's predilections while assessing difficult questions of law. Given OPR's analysis here, however, one cannot help but wonder whether OPR would be applying a heightened standard (or even conducting an investigation) had OLC concluded that each of the enhanced interrogation techniques proposed by the CIA was unlawful. Or whether a heightened standard of review would apply had OLC rendered such a conclusion and a catastrophic terrorist attack had been the result. Department attorneys tasked with answering extremely difficult questions should not find themselves asking such questions.

It is also worth noting—regardless of OPR's apparent policy preferences—that the Bybee Memos in no way advocate the "abrogation or derogation" of the prohibition against torture. To the contrary, their very purpose was to ascertain the boundaries beyond which CIA interrogators could not venture under the law. That the Bybee Memo considered whether certain defenses *might* be available to those interrogators if they overstepped their bounds does nothing to undermine this purpose. And the fact that the Bybee Memo also discussed whether the President has the constitutional power to override a particular statute during the exigencies of war is a very different question from whether the President should, as a matter of policy, do so. The implications of such a decision are obviously great—whether discussed in terms of "*jus cogens* norms" or not—and the President did not require OLC attorneys to inform him of that fact. Nor, of course, did the President need OLC to inform him of the thousands or perhaps millions of lives at risk if he did not consider all means at his disposal to prevent al Qaeda's unabashed violations of *jus cogens* norms. By invoking *jus cogens* as a basis for applying a supremely heightened standard of professional responsibility to Department attorneys assessing the legality of enhanced interrogation techniques, OPR knowingly stacks the deck with a deeply malleable card. No one should be under any illusions that this tailor-made "highest" standard of care will not find new and unforeseen uses down the road, when electoral fortunes once again turn and a new crowd of partisans agitates for retribution against their political opponents in the last administration.[21]

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cogens" disciplinary review would vary if Congress had passed a law *requiring* "torture" in the field of battle.

[21] In light of OPR's application of the *highest* standards to Professor Yoo and Judge Bybee, it is worth considering why OPR goes out of its way to apply the *lowest* possible standard when it comes to its own burden. OPR concedes that state bar authorities "generally use the higher 'clear

In the Draft Report, OPR concluded that it was "self-evident" that its heightened standard should apply to Professor Yoo and Judge Bybee. D.R. at 129–30. In its Final Report, OPR no longer contends that this proposition is self-evident, but continues to offer no persuasive rationale for it. Department attorneys should be held to applicable professional standards in all of their many important matters, whether they are addressing the legality of interrogation techniques to be used on al Qaeda terrorists, or investigating dedicated civil servants who performed their duties in good faith during uncertain and trying times. There is no place for the imposition of policy-laden value judgments on the ethical standards to be applied to the work of Department attorneys, as OPR has done in applying a heightened standard here. The net of the matter is that OPR has not relied on a "known, unambiguous obligation" in its Final Report because Professor Yoo did not violate one.

IV. OPR Ignores The Approvals And Subsequent Reaffirmation Of Judge Bybee's And Professor Yoo's Legal Conclusions At The Highest Levels Of The Department of Justice And Elsewhere.

The list of Department of Justice and other Executive Branch attorneys who vetted the Bybee Memos without demur is long and distinguished. Attorney General John Ashcroft. Deputy Attorney General Larry Thompson. Assistant Attorney General for the Criminal Division Michael Chertoff. Counselor to the Attorney General Adam Ciongoli. White House Counsel Alberto Gonzalez. National Security Council Legal Advisor John Bellinger. The list is even longer when including those Department attorneys who later agreed that waterboarding and other enhanced interrogation techniques do not amount to torture within the meaning of the statute. And this is to say nothing of the many bipartisan policymakers who approved of the techniques.

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and convincing evidence' standard of proof," F.R. at 13 n.13, which is true for both D.C. and Pennsylvania. *See In re Romansky*, 938 A.2d 733, 739 (D.C. 2007); www.padisciplinaryboard.org/faqs/consumers.php ("What is clear and convincing evidence? It is the burden of proof by which ODC [the Office of Disciplinary Counsel] must show alleged attorney misconduct. It is a heavier standard of proof than would be necessary to prevail in a civil action."). But OPR hides behind an entirely inapposite statute for the proposition that a preponderance of the evidence is "the statutory standard of proof for upholding a disciplinary action for misconduct." F.R. at 13 n.13. The citation OPR provides, 5 U.S.C. §770(c)(1)(B), is nowhere to be found in the United States Code. Presumably this is a typographic error, however, and OPR intends to rely on 5 U.S.C. § 7701(c)(1)(B) to support its argument. But that provision specifies the standard used by the Merit Systems Protection Board for an appeal by an aggrieved "employee or applicant for employment." Both Professor Yoo and Judge Bybee are *former* Department employees, of course, and their appeal lies to the Office of the Deputy Attorney General, not to the MSPB. Whatever standard that agency uses is of absolutely no relevance whatsoever here. The only relevant standard of proof here is the standard that would be applied on the merits by the bar authorities to which OPR proposes to refer Professor Yoo and Judge Bybee, and *those* authorities apply the clear and convincing standard. OPR makes no claim that it could satisfy that standard, however, because even under a preponderance of the evidence its case is an utter sham. That OPR proceeds undeterred should come as little surprise, one must suppose, as it has already demonstrated that it is perfectly prepared to make a sanctionable bar referral of a clearly time-barred claim, and it repeatedly demonstrates it has no intent of holding *itself* to high standards.

OPR in fact determined that Attorney General John Ashcroft "was ultimately responsible for the Bybee and Yoo Memos and for the Department's approval of the CIA program." F.R. at 259. And OPR determined that Ashcroft and other senior Department officials "should have looked beyond the surface complexity of the OLC memoranda and attempted to verify that the analysis, assumptions, and conclusions of those documents were sound." F.R. at 259. But earlier in the Final Report, OPR recognizes that Ashcroft in fact "engaged Yoo in a vigorous discussion" of the "legal reasoning" behind the approved interrogation techniques and was "ultimately satisfied" with the "reasoning and analysis." F.R. at 60. With respect to waterboarding specifically, Ashcroft and his counselor (Ciongoli) "concluded that Yoo's position was aggressive, but defensible." F.R. at 60. OPR nevertheless concludes without discussion that "as a matter of professional responsibility," it was acceptable for Ashcroft and other "senior Department officials to rely on advice from OLC." F.R. at 259.

Notwithstanding its assertion that "Department attorneys considering the possible abrogation or derogation of a *jus cogens* norm such as the prohibition against torture must be held to the highest standards of professional conduct," F.R. at 25, OPR apparently believes that this heightened standard applies only to Professor Yoo and Judge Bybee and not to the Attorney General or other senior Department attorneys equally aware—after "vigorous discussion"—of the significant issues involved and who strenuously defended the legality of the EITs in the highest councils of government.[22] Although Model Rule of Professional Conduct 5.1, as adopted in the District of Columbia and elsewhere, imposes a duty to supervise on senior attorneys, OPR makes no effort to analyze the supervisory requirements under this rule, Department rules and regulations, or other sources.

This is not remotely to say that Attorney General Ashcroft or others committed professional misconduct. Like Professor Yoo and Judge Bybee, they assuredly did not. Rather, the point is that the OPR attorneys never bothered to consider the issue, because they had identified their chosen targets early in the investigation and spent the next several years attempting to build a case against them. In fact, any impartial observer who reads the transcripts of Professor Yoo's interviews in June and July 2005—he voluntarily appeared for interview without counsel twice, without any legal obligation to do so—would recognize the accusatory template for OPR's "questions" to bear a striking similarity to the draft "report" issued by OPR four years later. This is not the work of "objective" investigators.

[redacted]

[redacted]

More astonishingly, notwithstanding five years of work, OPR states that it "did not attempt to determine and did not base [its] findings on whether the Bybee and Yoo Memos arrived at a correct result." F.R. at 160. It similarly dismisses "the fact that other OLC attorneys subsequently concluded that the CIA's use of EITs was lawful" as "not relevant to [its] analysis." F.R. at 160. OPR apparently cannot be bothered with the inconvenient fact that Professor Yoo and Judge Bybee gave correct advice to their client on the use of those interrogation techniques, even though the issues were close and difficult, and the national exigency following September 11, 2001 did not allow them a half-decade to ponder the question, or afford them the luxury of punting on the answer. Rather, OPR seeks professional sanction for Professor Yoo and Judge Bybee for giving legal advice that it concedes may be completely sound because it thinks some other things might be said on the issues presented. Of course, OPR cites no authority for the proposition that lawyers can be sanctioned for giving correct legal advice based on good-faith analysis. And, OPR's protestations notwithstanding, the fact that other OLC attorneys did subsequently affirm the advice given is *highly* relevant. *See* Rotunda Letter at 3–4.

[redacted]

In support of its conclusions, the Final Report places great emphasis on the fact that the unclassified Bybee Memo was "replaced" by the Levin Memo,[24] but gives no credence to the fact that the Classified Bybee Memo—which provides the detailed operational guidance—remained in effect. In fact, the Levin Memo *confirmed, rather than disavowed, the conclusions reached by Professor Yoo and his colleagues as to what precisely the CIA could and could not do.* And the Levin Memo underscored the point:

> While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and *do not believe that any of their conclusions would be different under the standards set forth in this memorandum*.

Levin Memo at 2 n.8 (emphasis added).

And, although the Classified Bybee Memo was later *superseded* by the Bradbury memoranda,[25] the bottom-line advice again did not change. As the now-public Bradbury memoranda make clear:

> In order to avoid any confusion in this extremely sensitive and important area, the discussions of the statute in the [Levin Memo] and this memorandum *supersede* that in the [Classified Bybee Memo]; however, this memorandum *confirms the conclusion of* [the Classified Bybee Memo] . . . .

Bradbury Techniques Memo at 6 n.9 (emphases added). The Classified Bybee Memo of course relies heavily on its unclassified counterpart.[26]

Although the Levin and Bradbury memoranda modify the specific intent and statutory interpretation analyses, the differences are far from monumental. And while the Levin Memo also omits discussion of the Commander-in-Chief power and common-law defenses, it does so only because it brands the discussions "unnecessary." Levin Memo at 2. Of course, as David Addington made clear in his testimony before the House Judiciary Committee, *see infra* Section VI.F, Professor Yoo and Judge Bybee did not have the luxury of ignoring the very questions asked by their client.

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[24] Memorandum for James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A* (Dec. 30, 2004).

[25] OPR defines and discusses these memoranda on page 132 of the Final Report.

[26] Similarly, OLC's advice to the Department of Defense concurred in the context of its consideration of the legality of specific techniques. In reliance on that advice, the DoD Working Group ultimately approved 24 specific techniques, most of which were already authorized by the Army Field Manual. All of them were—and remain—unquestionably lawful. *See, e.g.*, J. GOLDSMITH, THE TERROR PRESIDENCY 153 (2007).

The Levin Memo also emphasizes the distinction between legal advice and policy advice. It explicitly makes the point that OLC attorneys—including the authors of both Bybee Memos—understood this distinction and offered only legal advice:

> [OLC's] task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States.

Levin Memo at 4 n.11. The Yoo Memo makes a similar point: "By delimiting the legal boundaries applicable to interrogations, we of course do not express or imply any views concerning whether and when legally-permissible means of interrogation should be employed. That is a policy judgment for those conducting and directing the interrogations." Yoo Memo at 1 n.1. Thus, not only did OLC attorneys understand this distinction, but their repeated statements ensured that the audience of the memos understood it, too.

OPR, however, apparently fails to understand this distinction, because it condemns the authors of the Bybee Memos on matters of *policy* even though the bottom-line advice that particular techniques were lawful in the Bybee Memos were affirmed in subsequent OLC opinions. Indeed, the Final Report's detailed (and in large part irrelevant) factual background sections reveal quite clearly that OPR's real disagreement is with the Bush administration's anti-terrorism policies rather than the legal advice given by OLC. OPR even dwells on the use of unauthorized, abusive interrogation techniques and prisoner abuse wholly *unrelated* to interrogation (*e.g.*, a death caused by hypothermia when the prisoner was allegedly deprived of clothing as punishment for attacking guards). F.R. at 88–90. None of this has anything remotely to do with any legal advice provided by Professor Yoo or Judge Bybee or anyone remotely connected with OLC.

These critical facts—that the Bybee Memos were approved at the highest levels of the Department of Justice, that lawmakers did not take issue with OLC's interpretation (much less amend the statute to codify any disapproval) after they were briefed on the details of the interrogation program, and that the bottom-line advice did not change even after the unclassified Bybee Memo was withdrawn and subjected to public debate and criticism—should be of utmost importance when assessing Professor Yoo's work. But OPR pays them no heed. OPR merely critiques some of the analytical steps taken to reach the (repeatedly reaffirmed) legal conclusions, and apparently objects to policy decisions the Bush administration made with the support of bipartisan congressional leaders. But even if OPR is right on the policy front—and it is doubtful that one can be "right" about such a subjective matter—this is not remotely sufficient to support a charge of professional misconduct.

V. OPR Does Not Assess Professor Yoo's Conduct In The Factual Context In Which It Occurred, As The Rules of Professional Conduct Require.

The D.C. Rules of Professional Conduct, on which OPR relies, "presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." D.C. Rules, "Scope," cmt. [3]; *see also Atty. Grievance Comm'n of Md. v. Kemp*, 641 A.2d 510, 514 (Md. 1994) (assessing ethical violations based on "the facts and circumstances of the particular case"). OPR has not assessed Professor Yoo's conduct through that prism; in fact, OPR has not even *tried*. Among other shortcomings, OPR omits any serious discussion of the wartime mindset thrust upon the United States by the 9/11 terrorist attacks and of the accompanying fear of a follow-on attack still prevalent throughout the country in August 2002, and omits even to mention the chilling facts upon which OLC was required to render a complex and difficult legal opinion:

> Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here . . . . [Abu Zubaydah] is withholding information regarding the terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas. . . . [Y]our intelligence indicates that there is currently a level of "chatter" equal to that which preceded the September 11 attacks.

Classified Bybee Memo at 1.

Although quick to cite critics of the Bush Administration's anti-terrorism policies, OPR avoids any meaningful discussion of wholly unprecedented circumstances that confronted Professor Yoo and indeed the entire Nation in 2002. When the Bybee Memo and Classified Bybee Memo were signed on August 1, 2002, the Nation was less than eleven months removed from the deadliest terrorist attacks ever on United States soil. It is undeniable, if not as front of mind as once was the case, that in the weeks and months immediately following 9/11 the entire Nation was gravely concerned that another catastrophic attack might be imminent. It is now known, as noted below, that during this time "the CIA was struggling to obtain critical information from captured al Qa'ida leaders." And it is also known, as OPR itself acknowledges, that the White House (and others) were most anxious for OLC to complete its work on the Bybee Memo and the Classified Bybee Memo "as soon as possible." F.R. at 57 (quoting Yoo email of July 24, 2002); *see also* F.R. at 61 (July 31, 2002 email from [redacted] to Philbin noting that "the White House wants both memos signed and out by COB tomorrow"). Patrick Philbin indeed told OPR that OLC faced "time pressures" and on August 1, 2002 was told that "this has to be signed tonight." F.R. at 63.

The eight years since 9/11 without a similar attack have perhaps dulled memories of the lingering uncertainty that gripped the Nation at that time. Dennis C. Blair, President Obama's Director of National Intelligence, described the country's mood in 2002 in these terms:

> It is important to remember the context of these past events. All of us remember the horror of 9/11. *For months afterwards we did not have a clear understanding of the enemy we were dealing with, and our every*

> *effort was focused on preventing further attacks that would kill more Americans.* It was during these months that the CIA was struggling to obtain critical information from captured al Qa'ida leaders, and requested permission to use harsher interrogation methods. The OLC memos make clear that senior legal officials judged the harsher methods to be legal.

Statement by the Director of National Intelligence Dennis C. Blair (Apr. 16, 2009), *available at* http://www.dni.gov/press_releases/20090416_1_release.pdf (emphasis added). To put it bluntly, the OLC attorneys were being told that all objective evidence suggested that the Nation's enemies were preparing, perhaps imminently, another terrorist attack that could kill thousands, and that there was good reason to believe that a notorious terrorist then in custody had valuable information that could avert that tragedy. The circumstances did not permit OLC the luxury of years of drafting and re-drafting—and it was not really an option for OLC's attorneys—to borrow a page from Bartleby, the scrivener—to respond that they "would prefer not to."

Leaders in Congress and in the intelligence community offered similar assessments of the state of the Nation following 9/11. Senator Bob Graham (D-Fla.), who was chairman of the Senate Select Committee on Intelligence in 2002, said at that time that "[u]nfortunately, we are not living in times in which lawyers can say no to an operation just to play it safe. . . . We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal opinion just because it is easier to put on the brakes." Bret Stephens, *The Politics of Liberal Amnesia*, Wall St. J. (Apr. 28, 2009) (citing and quoting sources above). The Washington Post's Bob Woodward, hardly a hawk in normal times, wrote in his book *Bush at War* that "I asked the president whether he and the country had *done enough* for the war on terror . . . . The possibility of another major attack still loomed." *Id.* (emphasis added). These are, of course, but two snippets from tens of thousands of accounts of the justified fear that gripped the United States in late 2001 and early 2002.

Even the briefest recitation of this context (far more, of course, could be said), should suffice to see that OPR's critiques are not only unfair but bordering on the preposterous. For example, OPR's pseudo-dramatically asserts that OPR has "found evidence that the OLC attorneys were aware of the result desired by the client," and that [redacted] even admitted her "'personal perspective was there could be thousands of American lives lost' if the techniques were not approved." F.R. at 227. This is rather damning, according to OPR, especially where one considers that the CIA told OLC that the specific interrogation techniques "were . . . essential to the success of the program." F.R. at 227. It would be surprising if OPR had not "found evidence" that OLC attorneys considered the judgment of the CIA experts to the extent it assessed the terror threat as it then existed. Until OPR came along, it had not occurred to anyone that it was the ethical duty of OLC attorneys to minimize or discount the facts as related by expert intelligence agencies and to play roulette with the lives of thousands of Americans.

OPR's analysis betrays a mulish refusal to consider the context maturely and responsibly. *Of course* the attorneys at OLC knew what the CIA wanted, since they knew the Agency was attempting to get information to thwart further terrorist attacks, and indeed OLC obviously was being asked to opine on specific interrogation techniques that it knew the CIA wished to use if it legally could do so. It was hardly improper that OLC knew what its client wanted; even in ordinary circumstances an attorney issuing a legal opinion nearly always knows "the result desired by the client." To suggest that there is something nefarious or unusual about this is either naïve or disingenuous. That OPR believes this provides a reason for professional discipline should alarm any responsible decisionmaker at the Department of Justice.

And *of course* OLC attorneys had a "perspective" that thousands of lives could be lost if the CIA could not go forward with its interrogation program—that is what they were being told by the experts at the Agency, and they were in no position to dispute this proposition. And *of course* Professor Yoo and others sought to determine whether there was a *legitimate* legal basis to permit the CIA to go forward with what the lawyers were being told was a national-security imperative of the highest order. OPR's apparent abhorrence of this perfectly appropriate fact demonstrates its complete inability to grasp the significance of the "facts and circumstances as they then existed"—as well as how OLC has properly operated within the Justice Department for decades.[27]

Unlike the law-professor critiques oft-cited by OPR, Professor Yoo and others at OLC did not face what was primarily an academic exercise, but rather very difficult, real-life issues as to which there was limited existing legal guidance. In its exercise of "post-post-9/11" hindsight, OPR gives no weight at all to the intense situation facing Professor Yoo and other OLC attorneys, and in particular the real and very grave concern that if OLC was unduly conservative in its legal analysis the result quite literally could be the loss of thousands of lives. OPR, from its biased vantage point, recognizes only *one side* of the difficult problem presented to OLC: the danger of condoning conduct that some might later conclude, even if incorrectly, to fall just over the line that statutorily defines

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[27] In this regard, it is no surprise that in May the senior legal ethics counsel for the D.C. bar wrote a letter to the *Washington Post* discussing why Bush Administration lawyers could not be sanctioned under the D.C. Rules for establishing a good-faith legal basis for approving enhanced interrogation techniques:

> If a client instructs his lawyer, "I want to perform a certain act; find me a legal way to do it," that lawyer's professional duty is to find a good-faith basis in the law to meet the client's needs while carefully advising the client of the risks of pursuing such a course of action. Such a lawyer not only acts well within the Rules of Professional Conduct, but he also serves his client well.
>
> Waterboarding is a perfect example. A lawyer may personally believe that such a practice constitutes torture, but there is, at the very least, a good-faith argument to be made that it is not—as evidenced by the fact that even now respected authorities argue that this is not torture. Thus, even if the ultimate arbiter decides that waterboarding is torture, that does not mean that lawyers who advised to the contrary should be professionally disciplined.

Saul Jay Singer, Letter to the Editor, WASH. POST (May 11, 2009).

"torture." It utterly fails to see—or perhaps consciously refuses to admit—the *other side* of what was at issue: the danger, measured in potential innocent lives lost, of being that lawyer feared by Senator Graham who says "no to an operation just to play it safe." *In undertaking the tasks assigned to him, Professor Yoo did not have the practical option of simply taking the "safe" route and saying no, where he believed in good faith that the answer was "yes."* Nor, as a practical matter given the requests of his client, did Professor Yoo have the option to say "no comment" on the topics that OPR now blasts as "unnecessary."

Apart from this huge blind spot, OPR's analysis also suffers from other failures to evaluate Professor Yoo's conduct in context. The Final Report claims, for example, that "none of the attorneys involved . . . asserted that they did not have sufficient time to complete the memoranda or that time pressures affected the quality of their work." F.R. at 226 n.185. This is true in the limited sense that the OLC attorneys produced work of high quality under extremely trying circumstances, but OPR deliberately engages in outright deception by suggesting that OLC attorneys had every luxury of time to give thorough treatment to every conceivable issue or set of facts that an OPR attorney with four-and-a-half years and a body of *ex post* criticism might deem relevant. OPR, in fact, well knows that "the attorneys involved" have "asserted" quite the opposite. As Professor Yoo noted in his statement to the House Judiciary Committee: "[W]e gave our best effort under the pressures of time and circumstances. We tried to answer these questions as best we could. Certainly we could have used more time to research and draft the legal opinions. But circumstances did not give us that luxury." *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 110th Cong., No. 110-189, at 11 (June 26, 2008).[28] In fact, OPR not only disregarded the House testimony, though brought to its attention, but has combed his sworn statements to OPR looking for anything it can portray as supporting its case, while wholly disregarding whatever is inconvenient for its pre-determined position.[29] OPR does not even try to keep its slanders consistent, at once faulting the OLC lawyers for fearing the imminent loss of thousands of lives *and* supposing that, in these circumstances, they thought they could take the time to produce, years down the road, an encyclopedic analysis of every possible caveat.

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[28] Professor Yoo also made this point clear in his voluntary interviews with OPR. After noting that the memos were produced in a few short months, even though "[s]ometimes the office takes years," Professor Yoo said that there was time pressure and that "a lot of the time pressure is just because only late in the game do we decide to do this second opinion. . . . I think for most of the time until maybe the last week and a half or two weeks, we had thought we were only going to do one." July 11, 2005 Yoo Tr. at 28–29. Indeed, according to OPR's own chronology, the Commander-in-Chief and defenses sections that it has singled out for particular criticism were added and finished in about two weeks, at the very end of the process, and at the client's express request. F.R. at 52. Professor Yoo also made clear that the memos needed to be finished by a date certain so that policy decisions of the utmost national-security importance could be made at the highest levels of government: "[A]s of a certain date . . . the President and NSC and the CIA were going to decide whether to do it. And so we had to, I know we had to get it done before then. But I think only late in the game is it clear that that becomes this August 1st date." July 11, 2005 Yoo Tr. at 29. OPR is supremely misleading when it claims that "Yoo told us that he did not feel time pressure to complete the memoranda," F.R. at 43, because what he actually said was that he "originally" did not feel time pressure, and he then went on to discuss the time pressure that he ultimately felt down the stretch. July 11, 2005 Yoo Tr. at 28.

In addition to downplaying the obvious time constraints, OPR also completely ignores the fact that OLC was limited in the resources it could to bring to bear given the security classification of the matter, the logistical issues that accompany such classification, and the many other pressing national-security concerns demanding the attention of its attorneys. This was, after all, only *one* of the many urgent national-security inquiries with which OLC was bombarded in this time period. It is of little significance that Levin and Bradbury—with the benefit of hindsight and more time—altered the legal analysis slightly or addressed some additional factual considerations, because it is clear that the bottom-line OLC advice on the techniques at issue did not change. The authors of the Final Report may believe that the Levin and Bradbury Memos are superior to the Bybee Memos, but that is no grounds for disciplinary sanction, especially when the circumstances facing the authors of the interrogation memoranda are fairly considered.

The failure of OPR to account for the facts and circumstances facing Professor Yoo and others, as it must do to judge their conduct properly, cannot, at the end of the day, be discounted as a mere oversight; rather it appears to be nothing short of intentional. OPR quotes academics who wrote in the safety of their ivory towers in 2004, *see, e.g.*, F.R. at 2–3—but not those in the real world who understood the enormous burdens facing government officials charged with protecting the Nation immediately after 9/11. OPR emphasizes that OLC attorneys were dealing with "a *jus cogens* norm" under international law, F.R. at 25, but give no credence to the importance of preventing another terrorist attack on American soil. And OPR takes four and one half years to produce a Draft Report that makes numerous glaring, fundamental errors in its analysis (and additional months to craft a "Final Report" that simply papers over the errors)—but then seeks to micro-critique the work of attorneys who had only a small fraction of this amount of time, were forced to struggle with seriously difficult issues, and (unlike OPR) had very limited ability to seek help from outside sources, without any recognition of these burdens and constraints. As we demonstrate further below in addressing its particular critiques of the memoranda, OPR's analysis is, at the end of the day, heavily infected and biased by this failure to take proper account of the facts and circumstances facing Professor Yoo and others at OLC.

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[29] It is impossible to know the extent to which OPR has played its cherry-picking game with other parts of the factual record—because OPR resolutely refuses to make that "investigation" available for any sort of critical review. But the approach that OPR has used in those parts of its works that can be checked inspires less than minimal confidence in its competence—and none in its honesty or objectivity.

VI. OPR's Substantive Analysis Is Fundamentally Flawed.

OPR's rampant procedural errors turn out to be merely a prelude to its woefully deficient critique of the substance of the memoranda. In attempting to prove that the authors of the memoranda lacked candor, OPR does not even acknowledge many fatal weaknesses in its argument—weaknesses to which we alerted OPR in our prior comments—much less persuasively respond to them. Those weaknesses are as basic as misunderstanding canons of statutory interpretation, citing irrelevant authority, mischaracterizing the memoranda's arguments, and ignoring judicial precedents that squarely validated the memoranda's analytical approach. The result is a set of criticisms so fundamentally flawed and so obviously results-driven that this report will profoundly embarrass the Department if ever subjected to objective scrutiny.

A. Specific Intent

Exhibit number one in OPR's catalogue of supposed "errors, omissions, misstatements, and illogical conclusions," F.R. at 159, in the Bybee Memo is that memorandum's treatment of "specific intent." In examining the elements of "torture" under 18 U.S.C. § 2340A, the Bybee Memo correctly noted that the statute requires that "severe pain and suffering must be inflicted with specific intent," which it interpreted as an intent "to achieve the forbidden act." Bybee Memo at 3. Citing and quoting from the Supreme Court's then-recent decision in *Carter v. United States*, 530 U.S. 255 (2000), which examined the distinction between "general" and "specific" intent in the context of the federal bank-robbery statute, the Bybee Memo then explained that Congress's use of "specific intent" in the torture statute meant that the infliction of "severe pain . . . must be the defendant's precise objective." Bybee Memo at 3. By contrast, "[i]f the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent." *Id.* at 3–4. Thus, even if a person knows that severe pain will result from his actions, he lacks the requisite specific intent "if causing such harm is not his objective." *Id.* at 4. The Bybee Memo concluded by noting that "good faith" is recognized as a defense to "specific intent" crimes, but cautioned that, as a practical matter, a jury was unlikely to credit such a defense if the defendant lacked a reasonable basis for his beliefs. *Id.* at 4–5.

This analysis does not simply vault the professional-conduct bar, it is manifestly *correct*. As we told OPR in our response to its Draft Report, two recent cases in the Third Circuit (one of them *en banc*) have adopted the Bybee Memo's analysis of specific intent. In those cases, the Third Circuit construed the definition of "torture" pursuant to regulations issued by the Department of Justice to implement the Convention Against Torture. Those regulations provide, in accordance with the United States' reservations at the time of ratification, that "[i]n order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5) (emphasis added).

In *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005), a distinguished panel of the Third Circuit (composed of Judge Fuentes, the late Judge Becker and then-Judge Alito) concluded that the phrase "specific intent" has an "ordinary meaning" "in American criminal law," and for that reason it must be construed to have that meaning, despite the immigration context in which the torture question had arisen in that case. *Id.* at 145. Relying, like the Bybee Memo, on *Carter, Auguste* then discussed the issue as follows: "The specific intent standard is a term of art that is well-known in American jurisprudence. The Supreme Court has explained that in order for an individual to have acted with specific intent, *he must expressly intend to achieve the forbidden act*." *Id.* (emphasis added). After quoting at length the *same example* from *Carter* that the Bybee Memo quoted, the Court concluded that "to constitute torture, there *must* be a showing that the actor had the intent to commit the act *as well as the intent to achieve . . . the infliction of the severe pain and suffering*." *Id.* at 145–46 n.23 (emphasis added). That is precisely the analysis set forth in the Bybee Memo. *See* Bybee Memo at 4 ("a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering"). Notwithstanding years of investigation and research, OPR's Draft Report completely failed to mention this case.

In *Pierre v. Attorney General*, 528 F.3d 180 (3d Cir. 2008) (*en banc*), another torture case that somehow also had completely escaped OPR's notice in the Draft Report, the Third Circuit sat *en banc* to consider whether the "specific intent" requirement under the Convention Against Torture is satisfied by a mere showing that an official "knows" that it is "practically certain that [the victim] will suffer severe pain." 528 F.3d at 182–83. By a lopsided vote of 10 to 3, the court answered that question in the negative. As it had in *Auguste*, the Court again adverted to the ratification history, including the fact that "[b]oth the President and the Senate indicated their understanding" that the Convention "contains a specific intent requirement." *Id.* at 187. That "understanding," the Court noted, "has domestic legal effect." *Id.* The Court also reaffirmed *Auguste*'s reliance on *Carter*, as well as *Auguste*'s conclusion that specific intent to torture requires *both* the intent to do the act *and* the intent to "achieve the consequences of the act, namely the infliction of the severe pain and suffering." *Id.* (internal quotation marks omitted); *see also id.* at 189–90 (discussing *Carter* and noting that "an actor who knowingly commits an act but does not intend the illegal outcome of that act, can only be held liable for a general, not specific, intent crime").

Accordingly, the Court concluded, "a petitioner cannot obtain relief under the CAT unless . . . [the] prospective torturer *will have the goal or purpose of inflicting severe pain or suffering*." *Id.* at 190 (emphasis added). The Court addressed the question of a defendant's knowledge as follows:

> We disagree that proof of knowledge on the part of government officials that severe pain or suffering will be the practically certain result . . . satisfies the specific intent requirement of the CAT. Rather, we are persuaded . . . that the specific intent requirement . . . requires a petitioner to show that his prospective torturer *will have the motive or purpose to cause him pain or suffering*. . . . *Mere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture*. Knowledge that

> pain and suffering will be the certain outcome of conduct may be sufficient for a finding of general intent but it is not enough for a finding of specific intent.

Id. at 189 (emphasis added).

It would appear that an understanding similar to the Third Circuit's has prevailed in "[e]very other circuit to consider the question" under the Convention Against Torture. *Villegas v. Mukasey*, 523 F.3d 984, 988 (9th Cir. 2008) (citing, *inter alia*, *Auguste*); *see also Pierre v. Gonzales*, 502 F.3d 109, 118 (2d Cir. 2007) (noting, in another CAT case, that "the phrase 'specifically intended' incorporates a criminal 'specific intent' standard .... The President and Senate knew full well that they were construing a treaty designed to stop criminal conduct. We cannot ignore the word 'specifically' in the ratification understanding ... and we decline to give it a counter-intuitive spin.").

The Bybee Memo therefore correctly interpreted the specific intent requirement of the torture statute—*without* the benefit of the subsequently developed body of case law addressing intent specifically in the context of torture. Its conclusions have been ratified by every court of appeals to consider the question. OPR nevertheless makes this undisputedly correct analysis the centerpiece of its argument that Professor Yoo committed professional misconduct—a telling barometer of the Final Report's overall strength. OPR's critique, the substance of which appears to be wholly lifted from secondary sources, not only is riddled with errors, but would be equally applicable to the sitting federal judges who have now adopted the Bybee Memo's interpretation of the torture statute.

First, OPR concludes that the Bybee Memo "failed to note the ambiguity and complexity in this area of the law." F.R. at 160. To support that critique, OPR quotes snippets from decades-old Supreme Court opinions stating that distinctions between "general" and "specific" intent can be "elusive" or "difficult[]." F.R. at 169–70 (citing and quoting from *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and *United States v. Bailey*, 444 U.S. 394 (1980)). Bizarrely, OPR also notes that in *Bailey* the Court suggested that conventional analyses of intent might be replaced by the American Law Institute's Model Penal Code, which would adopt a "'hierarchy of culpable states of mind ..., commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence,'" F.R. at 170 (quoting *Bailey*, 444 U.S. at 403–04) (alteration in original), and quotes *Liparota v. United States*, 471 U.S. 419 (1985), for the proposition that a "more useful instruction might relate specifically to the mental state required under [the statute in question] and eschew use of difficult legal concepts like 'specific intent' and 'general intent.'" F.R. at 170 (alteration in original).[30]

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[30] The federal law at issue in *United States v. Bailey*, 18 U.S.C. § 751(a), penalized the crime of prison escape. 444 U.S. at 396. Neither the language of the statute nor its legislative history mentioned the *mens rea* required for conviction. *Id.* at 406. In *United States v. United States Gypsum Co.*, the Court endorsed a "knowledge" standard for the criminal antitrust prosecutions under Section 1 of the Sherman Act, despite that Section 1 did not include a *mens rea* term. 438 U.S. at 443–44. The federal law at issue in *Liparota v. United States* penalized anyone who "'knowingly ... transfers, acquires, alters, or possesses'" food stamp coupons in a manner not

OPR cannot be serious, and if it is, cannot be taken seriously. How could anyone find fault with Professor Yoo's analysis on the theory that he should have "eschew[ed]" the "difficult legal concept" of "specific intent" in favor of the "mental state required" under the torture statute, when "specific intent" *is the mental state expressly required by the statute*? Analysis of this quality calls into question whether anyone at OPR has *read* the federal torture statute. No sane client would be interested in learning that the Supreme Court—at least as it was constituted 29 years ago—might have preferred that Congress write its laws using the terminology of the Model Penal Code when Congress, in the particular statute actually at issue, quite obviously did not do so.[31] Indeed, had Professor Yoo undertaken the analysis that OPR suggests, he might have been justifiably criticized for providing confusing, incompetent, and useless legal advice.

The Bybee Memo was not alone in failing to ponder the potential ambiguity in "specific intent"; neither did the Third Circuit opinions in *Auguste* and *Pierre*. The *en banc* Court in *Pierre*, for example, stated succinctly that "[s]pecific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result." 528 F.3d at 189. *Auguste* treated the issue as an easy one: "specific intent" is a term of art that has a well-known meaning in American law—and it treated as self-evident the proposition that anyone would know from *Carter* what that meaning is. Nowhere did these cases or similar others from other circuits discuss the difficulty of interpreting "specific intent"; the *en banc* Third Circuit even cited *Bailey* as supporting the point that """purpose" corresponds loosely with the common-law concept of specific intent,'" without noting *Bailey*'s dicta about the "difficulty" of the concept, *id.* at 190 (quoting *Bailey*, 444 U.S. at 405). Surely OPR does not mean to suggest that the federal judges writing and joining those decisions, including a current Supreme Court Justice, are guilty of professional misconduct for failing to ruminate on the supposed ambiguity in the phrase "specific intent."

OPR's response in the Final Report to the fact that federal courts have confirmed Professor Yoo's analysis—case law that OPR did not even bother to cite in its Draft Report—is that "*Pierre* [and the other cases were] decided long after the Bybee Memo was issued, and [have] no bearing on whether its authors presented a thorough view of the law at that time." F.R. at 175 & n.132. In typical fashion, OPR misses the point, which is this: If Professor Yoo is guilty of misconduct for surveying the legal landscape and finding the meaning of "specific intent" in the torture statute relatively clear, why is the same not true for the federal judges who looked at the exact same precedent and conducted the exact same analysis? Our argument is not that Professor Yoo was

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authorized by regulation. 471 U.S. at 420 n.1 (quoting 7 U.S.C. § 2024(b)(1)). The Supreme Court interpreted this statute to require proof that the defendant "knew that his conduct was unauthorized or illegal." *Id.* at 434.

[31] This was particularly true in 2002 of the Counsel to the President of the United States, who, in the middle of advising the President on urgent matters of war, presumably did not have copious amounts of free time for aimless philosophical reflection about alternative legal universes.

sufficiently thorough merely because his *conclusion* was validated by subsequent courts, but that Professor Yoo was sufficiently thorough because his *reasoning* and *methodology* were replicated by the later judicial opinions that reached the same conclusion based on the same authorities. It appears that in OPR's world, Department of Justice attorneys must be clairvoyant enough to abide by the subjective standards of conduct promulgated by their political opponents and critics years after the event (*e.g.*, they should have followed Johnsen's and Dellinger's "Principles Memo"), but they are to be given no credit for using the traditional tools of the legal craft to analyze a relevant legal issue, without the benefit of squarely applicable precedent in the torture context, in a manner that is subsequently vindicated by the unanimous judgment of courts of appeals that have considered the question. Indeed, although OPR does not acknowledged it, at the time the Bybee Memo issued, it was already clear that "torture can occur . . . only when the production of pain is purposive," that "torture requires acts both intentional and malicious," and that the defendant "must impose suffering cruelly and deliberately, rather than as the unforeseen or unavoidable incident of some legitimate end." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002).

Here, again, OPR scours the transcripts of Professor Yoo's voluntary interviews with OPR in search of statements that it believes buttress its case. It highlights, in particular, Professor Yoo's statement that he had found the law on "intent" "confusing." F.R. at 166. Professor Yoo, of course, is not a criminal-law specialist, either as a practitioner or as an academic. There is no reason for him to have any specialized antecedent understanding of the issue. What OPR does not highlight, indeed it goes out of its way to minimize, is that this prompted Professor Yoo to seek specialized help of the highest conceivable quality—not only by ordering another lawyer to research the issue thoroughly, but also by vetting the memo's analysis with Michael Chertoff, the head of the Criminal Division, who was a former federal prosecutor (and future federal appellate judge).[32] Whatever the degree of criminal-law expertise that he himself brought to the table—and however derisively OPR may now seek to characterize it—it is abundantly clear that Professor Yoo availed himself of the tools of a lawyer's craft to produce an analysis that was, and remains, impeccably correct.

There is in fact a good reason that Professor Yoo's final memorandum did not note the "uncertainty or ambiguity" in the meaning of "specific intent": There was none. In June 2000, shortly before Professor Yoo sat down to write the Bybee Memo, the United States Supreme Court had issued *Carter*, which concluded that one subsection of the bank-robbery statute created a "general intent" crime while the other required a showing of "specific intent" to steal, and offered examples to "help to make the distinction between 'general' and 'specific' intent less esoteric." 530 U.S. at 268–70. In explaining the precise and straightforward distinctions between "general" and "specific" intent, the Court cited the LaFave treatise, *id.* at 268–69, the same authority that OPR now cites for the proposition that "specific intent" has not been used consistently by the courts, *see* F.R. at 169. This supposed inconsistency did not trouble the Supreme Court, presumably because the LaFave treatise *also* states, and demonstrates through numerous examples, that specific intent actually has *one* most common meaning in American law. 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.2(e) (2d ed. 2003) ("the most common usage of 'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime[s]").

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[32] Others, of course, also vetted the analysis and conclusion of the memoranda, including Attorney General Ashcroft, who himself had served as Missouri Attorney General and on the Senate Judiciary Committee.

Unlike the Bybee Memo, the Draft Report *did not even cite* the Supreme Court's decision in *Carter*, let alone discuss it. And the Final Report mentions *Carter* only in passing, making no effort to explain how Professor Yoo's reliance on the most recent Supreme Court opinion on specific intent could remotely suggest that Professor Yoo's analysis was not thorough, much less incompetent. OPR evidently believes that Professor Yoo should have emphasized for the client that *older* Supreme Court cases had found the concept of specific intent difficult or elusive, though the more recent (and binding) decision in *Carter* had not. As a basis for professional discipline, this analysis borders on the frivolous. It may be that OPR attorneys do not believe in the ameliorative influence of the Supreme Court's opinions on the uncertainties and difficulties that attend most areas of law, but the rest of the legal profession (including judges and disciplinary boards) is generally required to work on the assumption that more recent, definitive rulings from that Court reflect a mature consideration and resolution of earlier-expressed uncertainties.

Second, OPR concludes that "OLC's advice erroneously suggested that an interrogator who inflicted severe physical or mental pain or suffering on an individual would not violate the torture statute if he acted with the goal or purpose of obtaining information." F.R. at 160–61. But OPR is unable to point to any statement in the Bybee Memo that says or even implies this, instead relying on the following sentence: "'Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.'" *Id.* at 167 (quoting Bybee Memo at 4). This criticism appears lifted from the Levin Memo. *See* F.R. at 168 (quoting Levin Memo at 17).

Whatever Mr. Levin may have thought, every jot and tittle of the statement quoted by OPR is an entirely accurate statement of the law. Indeed, it precisely echoes the holding of the *en banc* Third Circuit in *Pierre*: "We disagree that proof of knowledge . . . that severe pain or suffering will be the practically certain result . . . satisfies the specific intent requirement in the CAT. Rather, we are persuaded . . . that the specific intent requirement, included in the ratification history of the CAT, requires a petitioner to show that his prospective torturer will have the motive or purpose to cause him pain or suffering." 528 F.3d at 189. Under OPR's view, the ten judges in the Third Circuit majority have now committed professional misconduct by creating the impression—at least to OPR and Mr. Levin—that a torturer acting with the purpose of obtaining information is immune from prosecution. But this is an unfounded criticism. In fact, when the minority in *Pierre* expressed the same concern, *id.* at 196, the ten-judge majority had little difficulty in explaining why this criticism is wrong and unjustified. *Id.* at 190 n.7. Significantly, it was obvious to all thirteen judges that the issue they were debating had arisen in the context of the Bybee Memos; the minority noted that "Jay

Bybee . . . set forth an interpretation of 'specific intent' that is similar to that espoused by the majority," *id.* at 193, and the three judges who disagreed with the majority's analysis issued an opinion that was largely a pages-long quotation of the Levin Memo. OPR cannot credibly assert, merely because *it* finds the minority's views more persuasive, that the analysis that rather decisively carried the day in *Pierre* is sanctionable.

Moreover, a moment's thought would have revealed to OPR why Congress believed the specific-intent requirement so important for the torture statute and why Professor Yoo properly stated that knowledge alone is insufficient. In the absence of a specific-intent requirement, a general-intent statute criminalizing "torture" could, for example, reach a surgeon who performs open heart surgery in an Army base in Germany, or a physician who must amputate a leg in the field of battle in order to save a soldier's life. Both "know" to a *certainty* that their conduct will inflict "severe pain or suffering," but neither, of course, is guilty of "torture," because "causing such harm is not his objective." The surgeon, in other words, would save the man's life painlessly if he could. But nowhere does the Bybee Memo state or imply that a defendant's actual intent to cause severe pain is absolved by an ultimate motive to obtain information.[33] And critically, OPR does not cite any evidence—because there is none—suggesting that the CIA believed it could lawfully "torture" a detainee so long as it was trying to elicit information.

Third, OPR concludes that "[s]ome of the Bybee Memo's analysis was oversimplified to the point of being misleading," F.R. at 171, because it "suggested that, in order to violate the torture statute, a defendant would have to act with a 'purpose to disobey the law,'" F.R. at 173. OPR's criticism is premised on a gross distortion of the memo's two-sentence discussion of *Ratzlaf v. United States*, 510 U.S. 135 (1994).

The Bybee Memo cited *Ratzlaf* as an "example" of the application of a specific-intent requirement. The memo explained that because the statute at issue in *Ratzlaf* required "'specific intent to commit the crime,'" the defendant in that case had to act with the express "'purpose to disobey the law.'" Bybee Memo at 3 (quoting *Ratzlaf*, 510 U.S.

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[33] Nor does the Bybee Memo's reference to the absence of good faith alter the analysis. Take, for example, a battlefield surgeon who amputates a soldier's leg to save his life. Clearly the physician lacks the specific intent to cause severe pain and has not committed torture. Now, imagine that the physician acts in bad faith, prioritizing the surgery over other battlefield wounded and conducting the procedure ahead of the others for the sole reason that the soldier owes the physician a large debt that he would like to see repaid. The physician still lacks the requisite specific intent to cause severe pain to the wounded who must wait and is not guilty of torture, notwithstanding his bad faith. While such hypotheticals may be rare in practice, they are the tools through which lawyers and judges inform legal concepts like "specific intent." It is for this reason that the paragraph in question begins with the statement that it is discussing the law of specific intent as a "theoretical matter," and concludes with the overwhelmingly clear caveat that "when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent." Bybee Memo at 4. And other lawyers' and bloggers' ruminations about what the statement "sort of suggested" to them or how it "made them wonder," F.R. at 167–69, are entirely irrelevant.

at 141). OPR evidently believes that because the specific intent required in *Ratzlaf* was a specific intent to violate the law—a form of specific intent that statutes typically signal with the term "willful"—Professor Yoo was suggesting that the same *type* of specific intent was required under the torture statute.

No reasonable person could think that, given the Bybee Memo's *very next sentence*: "Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective." Bybee Memo at 3. Nowhere does the Bybee Memo suggest that intent to violate the law is required under the torture statute, and no one reading the memo's *Ratzlaf* discussion could take that away from it. In fact, if the memo even remotely was intended to suggest that intent to violate the law *was* required, one would expect to see this purported requirement used or even alluded to in the Classified Bybee Memo—which was issued *on the same day* for the purpose of analyzing the specific techniques proposed by the CIA under the standards outlined in the Bybee Memo. But nothing there, of course, supports OPR's strained reading.[34]

Fourth, OPR claims that the good-faith defense to a specific-intent crime "is generally limited to fraud or tax prosecutions." F.R. at 174. OPR cites no authority for this, relying only on a quotation from a jury-instructions treatise that does not support the assertion. In fact, two paragraphs later OPR actually cites a case that stands for the opposite proposition: In *United States v. Goings*, 313 F.3d 423 (8th Cir. 2002), the court found in a *theft* case that "[t]he district court *properly* gave the Eighth Circuit stock instruction on good faith." *Id.* at 427 (emphasis added). OPR thus manages, for once, to successfully refute an argument.

Fifth, OPR argues that "[t]he availability of good faith as a defense to torture is not a foregone conclusion" because a 1983 Fourth Circuit decision did not allow a defendant to invoke the good-faith defense when prosecuted under a statute criminalizing the export of firearms. F.R. at 174 (citing *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983)). OPR's argument here is misleading. In *Wilson*, like in *Ratzlaf* (but unlike here), the statute had a willfulness requirement—*i.e.*, a requirement that the defendant act with the specific intent to violate the law. *See* 721 F.2d at 970 n.1, 971. The defendant argued that he had believed his actions were lawful because they had been authorized by government officials, and therefore that he did not have the requisite specific intent to violate the law. *See* 721 F.2d at 974–75 & n.10. The Fourth Circuit found "insufficient *evidence* to justify" an instruction on the good-faith defense, however, because "none of th[e] evidence show[ed] that Wilson was still working for the government, or impliedly authorized by government officials to export firearms illegally." *Id.* at 975 (emphasis added). In other words, the defendant's good-faith defense had a factual predicate—that government officials had authorized his actions—for which the defendant had put forward no evidence. That holding casts no doubt on the Bybee Memo's discussion of specific intent.

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[34] In fact, a draft statement that specific intent requires "knowledge of the legal prohibition" was *deleted* from the final version, as OPR points out. OPR oddly concludes that this demonstrates the section is misleading, though it is not immediately apparent who might be "misled" by a statement in an earlier *draft*, which never saw the light of day. *See* F.R. at 173. Indeed, it is ironic that OPR believes that an attorney can violate duties of candor (or competence) based on drafts that are never conveyed to the client. Its own Draft Report—which OPR *did* deliver to its client in December 2008, with the express desire to further publish it forthwith—would fare rather badly under OPR's own standards.

Relatedly, OPR says that the Bybee Memo was deficient in "fail[ing] to advise the client that under some circumstances, a prosecutor can challenge a good faith defense by alleging willful blindness." F.R. at 174. The *en banc* Third Circuit in *Pierre*, however, had no trouble concluding that "willful blindness" is not relevant to an analysis of specific intent to torture. 528 F.3d at 188, 190. "Willful blindness," the Court explained, "can be used to establish knowledge but it does not satisfy the specific intent requirement in the CAT." *Id.* at 190. The Second Circuit reached the same conclusion in its own *Pierre* decision (involving a different petitioner with the same surname), explaining that it could "not see how" either "willful blindness" or "deliberate indifference," "which may bear on knowledge to the extent they establish conscious avoidance, can without more demonstrate specific intent, which requires that the actor intend the actual consequences of his conduct." 502 F.3d at 118. Willful blindness can be sufficient for knowledge (and thus general intent), but not specific intent.

OPR attempts to counter *Pierre*'s willful-blindness holding by arguing that its Draft Report "did not assert that the government could establish a defendant's specific intent through a willful blindness theory," but rather that "a willful blindness instruction might be granted under some circumstances to counter a defendant's claim that he held a good faith belief—based on knowledge obtained from the CIA—that the use of EIT's would not result in the infliction of severe mental or physical pain or suffering." F.R. at 175. In other words, OPR conceives of a hypothetical defendant who might be deemed to "know" (based on willful blindness) that a particular interrogation would result in the infliction of pain and suffering, despite what the CIA might have told him. Apart from being contrived and arcane, this feat of contortionism still misses the point: As *Pierre* holds, "knowledge" or awareness of the "result," even if it "could" be severe pain, does not meet the statutory standard, which requires the purposeful infliction of such pain. And, as in its Draft Report, OPR continues to rely solely on older cases that did not involve torture for its contentions that "the availability of good faith as a defense is not a *foregone* conclusion" and that "a prosecutor *can* challenge" an intent defense based on willful blindness "under *some* circumstances," and to criticize the Bybee Memo's failure to discuss "the *possibility* that a court *might* refuse to extend the good faith defense to a crime of violence such as torture" as rendering the analysis "incomplete." F.R. at 173–74 (emphases added). Of course, the Bybee Memo *did* caution that "as a matter of practice in the federal criminal justice system" a defendant who acted "unreasonabl[y]" but in good faith was "unlikely" to be acquitted. Bybee Memo at 5. OPR's contrivances notwithstanding, the Bybee Memo is simply not subject to criticism in this regard.

OPR dismisses as "cursory" the Bybee Memo's significant qualifying language, which made clear that a good-faith defense was unlikely to be successful if not reasonable. F.R. at 175. As OPR concedes, the memo "included qualifying language that made it clear that notwithstanding legal theory, as a practical matter a jury could infer specific intent from a defendant's actions." F.R. at 167. As a matter of fact, despite that the specific-intent discussion is only two pages long, the Bybee Memo notes in *several* places that much of the discussion is "theoretical," and that juries might well find specific intent notwithstanding the theory. *See, e.g.*, Bybee Memo at 4 ("While as a theoretical matter such knowledge [that severe pain or suffering will result] does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.") (internal citations omitted); *id.* at 5 (noting that "as a matter of practice in the federal criminal justice system" a defendant who acted "unreasonabl[y]" but in good faith is "unlikely" to be acquitted.). It cannot be credibly said that these repeated qualifications are only cursory, nor can Professor Yoo and Judge Bybee be condemned for accurately describing the law while conveying real-world limitations on the legal doctrine. A fair reading of these two pages reveals that OPR's assertion is baseless.

No doubt recognizing the highly qualified (and manifestly correct) specific-intent analysis provided in the Bybee Memo, OPR is forced to point to other sources to support its theory that the advice was insufficient. OPR states, for example, that "OLC's advice to the CIA on specific intent and good faith was not limited to the Bybee Memo. In the Yoo Letter, the Classified Bybee Memo, and the CIA Bullet Points, OLC presented an unqualified, oversimplified view of the law without acknowledging potential problems." F.R. at 175–76; *see also* F.R. at 227 ("Yoo provided the CIA with an unqualified, permissive statement regarding specific intent in his July 13, 2002 letter"). But OPR's reliance on these documents merely demonstrates the lengths it is willing to go to present its entirely one-sided view. The Yoo Letter and the Classified Bybee Memo were delivered to the client along with the Bybee Memo on August 1, 2002, and were clearly meant to be read in conjunction with it. It is unreasonable to suggest that each of the documents should have re-plowed all of the ground covered in the Bybee Memo, much less that the failure to do so amounts to sanctionable conduct. The so-called Bullet Points, a *CIA document* providing an *overview* of OLC's analysis, would not be expected to provide the same detailed analysis as the Bybee Memo, and OPR does not allege that the specific-intent summary, *see* F.R. at 103, 165, incorrectly states the law.[35] The July 13, 2002 letter, moreover, was clearly tentative, summary advice superseded by the more detailed analysis provided in the Bybee Memo. *See* F.R. at 162 & n.126 (noting the closing statement of the July 13, 2002 letter, "'[a]s you know, our office is in the course of finalizing a more detailed memorandum opinion analyzing section 2340,'" and stating that "[w]hen the Bybee Memo was issued a few weeks later, it included a more extensive discussion of the specific intent element.").

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[35] With respect to the Bullet Points, OPR concludes, based only an internal CIA memorandum for the record, that "the document 'was fully coordinated with John Yoo.'" F.R. at 102. Of course, OPR never bothered to ask Professor Yoo about this issue during either of his voluntary interviews, and, contrary to the CIA's assertion, he recalls informing the CIA that any summary of OLC's analyses would be the CIA's only, and could not be endorsed by OLC. Although OPR claims that [redacted] provided comments to the CIA, that the CIA believes OLC "formally concurred" on the Bullet Points on June 4, 2003, and that the CIA sent a final version of the document to OLC on June 16, 2003, Professor Yoo left the Department in late May 2003. F.R. at 27. Whatever their merits or shortcomings, Professor Yoo was not responsible for the CIA Bullet Points, and OPR's suggestions to the contrary, *see, e.g.*, F.R. at 161, are factually baseless.

Sixth and finally, OPR cites the Levin Memo *approvingly* for the proposition that it would not be "useful to try to define the precise meaning of 'specific intent'" in the torture statute, because "it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." F.R. at 169. OPR appears to be suggesting that Professor Yoo should have omitted the clearly correct legal analysis of specific intent and instead ducked the issue altogether—declining to interpret one of the elements of the criminal statute that he was tasked with analyzing. But this is wrong under elementary principles of criminal law. A person does not violate a criminal statute unless his conduct meets *each* of the elements; and no competent lawyer could offer advice on whether conduct violates a criminal proscription without examining each element of the relevant statute. In other words, a complete and competent analysis could not conclude that "conduct that might otherwise amount to torture" actually *is* torture under this statute without first defining specific intent. OPR's inability to understand this simple point is inexplicable.

B. Severe Pain

One of the most challenging tasks that the authors of the Bybee Memo faced was to give concrete meaning to the torture statute's ambiguous term "severe . . . pain" so that it could be applied to real-world interrogations of terrorists with information about future attacks. They first looked to dictionaries, which said that pain or suffering is "severe" if it is "of such a high level of intensity that the pain is difficult for the subject to endure." Bybee Memo at 5. As any competent lawyer would do, the authors then examined other statutes that used the term "severe pain" to determine whether Congress's use of the word "severe" in those statutes "shed more light on its meaning" in § 2340(1). *Id.* Their research disclosed that Congress used the term "severe pain" in six different provisions (relating to health benefits) when defining an emergency medical condition.

> Under those statutes, an emergency medical condition is one:
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> manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—(i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.

42 U.S.C. § 1395ww-22(d)(3)(B) (2003). The Bybee Memo expressly acknowledged that "these statutes address a substantially different subject from Section 2340," but, after citing *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), found them "nonetheless helpful for understanding what constitutes severe physical pain." Bybee Memo at 6. The memo concluded that these health benefits statutes "*suggest*" that for pain to be sufficiently "severe" under Section 2340 such pain must rise to a "*similarly* high level—the level that would ordinarily be associated with a sufficiently serious

physical condition or injury such as death, organ failure, or serious impairment of body functions." *Id.* at 6 (emphases added). OLC deemed those statutes relevant because they *confirmed* the ordinary meaning of the statutory language: "[T]his view of the criminal act of torture is consistent with the term's common meaning. Torture is generally understood to involve 'intense pain' or 'excruciating pain,' or put another way, 'extreme anguish of body or mind.'" *Id.* at 13 (quoting dictionaries).

The Draft Report gave the Bybee Memo's consideration of the medical-benefits statutes top billing in OPR's catalogue of supposed analytical failings, emphatically asserting that citation to those statutes clearly was unconventional legal analysis amounting to professional misconduct. By OPR's lights, a lawyer could reasonably cite other statutes in construing statutory language if those statutes were sufficiently related in subject matter as to be considered "*in pari materia*," but it was obvious incompetence for any trained lawyer to consider *unrelated* statutes in advising a client. And this should have been obvious to Professor Yoo, the Draft Report asserted, because *Casey* "was premised upon the in pari materia doctrine." D.R. 139. "We know of no authority," OPR said, "in support of the proposition that identical words or phrases in two unrelated statutes are relevant in interpreting an ambiguous term." D.R. at 138. Indeed, Professor Yoo easily could have discovered this obvious interpretive no-no, OPR sarcastically noted, because the Sutherland treatise on statutory interpretation "was available in the main DOJ library when the Bybee Memo was written." D.R. at 137–38 & n.121.

We responded to the Draft Report by listing numerous cases—including *Casey*—in which the Supreme Court of the United States has cited unrelated statutes in statutory interpretation.[36] We also noted that this commonplace technique—for which OPR could find "no authority" after four years of research—is also discussed in the Sutherland treatise itself, which to devotes an entire chapter to "interpretation by reference to statutes on *other subjects*," with a section entitled "interpretive relevance of *unrelated* statutes." *See* 2B NORMAN J. SINGER, SUTHERLAND ON STATUTES & STATUTORY CONSTRUCTION ch. 53 (6th ed. 2000) (emphasis added). It is worth noting, again, that OPR was prepared to issue its Draft Report as final in January 2009, after *years* of supposedly exhaustive investigation and drafting had resulted is astoundingly incompetent legal work.

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[36] *Casey* directly supports the appropriateness of examining unrelated statutes to help clarify the meaning of statutory terms. The interpretive issue in *Casey* was whether the term "attorney's fees" in a civil-rights litigation fee-shifting statute included fees for expert witnesses. *See Casey*, 499 U.S. at 84. The Supreme Court answered that question by surveying the provisions of more than 34 other *unrelated* statutes, including the Toxic Substances Control Act and the Endangered Species Act. *Id.* at 88–89 & n.4. Based on its review of those unrelated statutes, the Court concluded that "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost." *Id.* at 88; *see also Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009) (to interpret the meaning of the word "now" under the Indian Reorganization Act, the Court cited its prior decisions interpreting the word "now" in unrelated statutes: a federal criminal statute and a statute granting citizenship status to certain foreign-born children); *Dep't of Energy v. Ohio*, 503 U.S. 607, 621–22 (1992) (interpreting the term "sanction" in the Clean Water Act to refer to "coercive fines," rather than punitive fines, based on "examples of usage" in unrelated statutes, including the Federal Rules of Civil Procedure, the California Civil Procedure Code, and a statute waiving sovereign immunity for federal medical-waste disposal facilities); *Lukhard v. Reed*, 481 U.S. 368, 376 (1987) (plurality opinion) (personal injury awards are "income" under the AFDC statute because the Internal Revenue Code and the Food Stamp Act expressly *excluded* personal-injury awards from "income"; this supported the proposition that such awards are *included* in "income" under the AFDC statute, which was silent on the subject); *Jeffers v. United States*, 432 U.S. 137, 148 n.14 (1977) (plurality opinion) (interpreting "in concert" under the Comprehensive Drug Abuse Prevention and Control Act to mean "cooperative action and agreement" by relying on how the phrase had been used in six statutes on different subject matters, including the Federal Election

At this point, even Emily Litella would have had the sense to say "never mind," and call it a day.[37] But not OPR. Without acknowledging its previous errors, OPR now says that examining the language of unrelated statutes "*is a recognized technique of statutory interpretation.*" F.R. at 182 (emphasis added). But OPR contends that for a lawyer to do so the statutes must be "similar in purpose or subject matter" *or* that there must "generally" be "a logical basis" for "courts [to] look to unrelated statutes for guidance." F.R. at 182–83. Here, OPR contends, the "medical benefits statutes were neither related, similar, nor analogous to the torture statute," and this, "coupled with the fact that they did not in fact define, explain or interpret the meaning of 'severe pain' . . . led us to conclude that the Bybee Memo's reliance on those statutes was unreasonable." F.R. at 184. Unsurprisingly, however, OPR's newest set of fabricated rules of statutory interpretation once again fail to support the predetermined outcome to which OPR so relentlessly clings.

The fundamental flaw in OPR's analysis lies in its failure (or unwillingness) to recognize *why* the Supreme Court so often consults unrelated statutes that contain language similar to the language under review. Unrelated statutes are relevant evidence of the *ordinary meaning* of the disputed language. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009) (usage in unrelated statutes confirmed the "ordinary meaning" of statutory language as set forth in dictionaries). As Sutherland explains, in a passage that OPR again declines to mention, one reason that looking to unrelated statutes is such a common technique of statutory interpretation—albeit one not as persuasive as looking to statutes *in pari materia*—is that the way Congress has used a particular phrase in the past, "even among statutes on different and dissimilar subjects," can reveal "common idioms and customary language usage." 2B SINGER § 53:01. Because of that, "[t]he difference between statutes which are closely enough related to be regarded as in pari materia and those which are not is . . . only one of degree." *Id.* § 53:02.

Moreover, as *Casey* noted in the passage that was cited in the Bybee Memo, the Supreme Court construes new statutory language "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and

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Campaign Act, the Merchant Marine Act, the Commodity Futures Trading Commission Act, and the Interstate Commerce Act); *cf. United States v. A & P Trucking Co.*, 358 U.S. 121, 124 n.3 (1958) (partnerships were included in the definition of the term "whoever" in a criminal statute regulating safe transportation of dangerous material based on Congress' inclusion of partnerships within the definition of "person" in a number of statutes, including the Civil Aeronautics Act, the Federal Communications Act, the Shipping Act, and the Tariff Act).

[37] *See, e.g.*, http://www.hulu.com/watch/4256/saturday-night-live-emilys-editorial-reply-22

subsequently enacted law," *because* "it is our role to make sense rather than nonsense out of the *corpus juris*." 499 U.S. at 100–01. That is, the *entire* "body of the law" (the *corpus juris*) provides a fundamental backdrop for consistent interpretation of like statutory terms, at least when the text of the new statute does not itself affirmatively "prevent[] such accommodation." *Id.* at 101; *see, e.g.*, *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 448 n.3 (2006) (court's "natural reading" was "confirmed" by the use of the same word "elsewhere in the United States Code"—not just those parts of the Code that were "similar" or had a supposed "logical connection" with the subject matter). OPR does not contend that the torture statute by its terms foreclosed reliance on the medical-benefits statutes; nor could it, given that those statutes were cited solely because they appeared to *confirm* the ordinary meaning suggested by dictionary definitions, and even OPR does not contend that a lawyer commits misconduct by consulting standard English dictionaries.

OPR does not address the reasoning of these cases, but it simply announces that unrelated statutes may not be consulted at all unless there is a "logical basis" for doing so. OPR does not explain what exactly are the contours of this requirement (much less whence it comes), but the examples it cites make clear that this "test" is either trivial (in the sense that *every* unrelated statute meets it) or meaningless, or both. For example, OPR first says that it makes some difference that the word or phrase in the unrelated statute "has been interpreted by the courts." F.R. at 183. This point appears designed solely to distinguish *Carcieri v. Salazar*, *supra*, which interpreted the word "now" in the Indian Reorganization Act in part by looking to how the Court had previously interpreted the word in a federal criminal statute and a citizenship statute. 129 S. Ct. at 1064. Of course, when Congress uses a phrase that has *previously* acquired a well-settled meaning in judicial rulings courts will presume that the same meaning is intended in the new statute. But that is not remotely what happened in *Carcieri*, where the Court made clear that one of the interpretations on which it relied *post*-dated the Indian Reorganization Act. *Id.* What was at issue instead was the policy identified by the Supreme Court in *Casey*—*viz.*, construing like terms similarly in order to "make sense rather than nonsense" out of the entire United States Code. (Indeed, *Casey* expressly noted that, absent this policy, it would not make sense to consult "both previously and subsequently enacted law," because "how could an earlier Congress know what a later Congress would enact?" 499 U.S. at 100-01). In any event, OPR does not explain why it should make any difference that the particular unrelated statute *has* received a judicial construction; if, by OPR's lights, the underlying statute lacks a "logical connection" to the statute being construed, then presumably any judicial interpretation of that unrelated statute would be just as logically *un*connected to the problem at hand.

OPR distinguishes *Buckeye Check Cashing*, *supra*, by claiming there was "some logical basis" for referring "to language in completely dissimilar statutes" throughout the United States Code in that the term at issue was used elsewhere consistently with the meaning that the Court had already derived by consulting other sources, and "the Court did not rely *solely* upon similar language in dissimilar statutes." F.R. at 183–84 & n. 138 (emphasis added). If this distinction is not wholly question-begging (*i.e.*, there is a "logical" connection only if OPR subjectively believes the citation supports the point at issue), the same could be said about the Bybee Memo, which used the medical-benefits statutes in conjunction with dictionary sources.

Finally, OPR's distinction of *Department of Energy v. Ohio*, 503 U.S. 607 (1992), not only is unhelpful to OPR's case but also shows its "logical connection" test to be utterly trivial. According to OPR, the "logical basis" for the Court's use of unrelated statutes in *DOE* was that the unrelated statutes showed "usage of [the] term in other contexts." F.R. at 183. But of course *any* inclusion of a term in another statute gives context to the term. That was the reason that the Bybee Memo looked to the use of "severe pain" in the medical-benefits statute—to infer from its context the level of pain that the ordinary meaning of the term connoted.[38] OPR's "logical basis" requirement is thus a meaningless distinction drawn to salvage a fatally flawed argument, akin to the last-minute scribbling on a law-school bluebook when the student realizes that the entire premise of his answer is mistaken.

OPR's remaining criticisms are similarly misdirected, and none provides a basis for professional discipline. OPR contends that the Bybee Memo paraphrased the language of the medical-benefits statutes in a way that heightened the standard for severe pain. According to OPR, for instance, the Memo equated the medical-benefits statutes' phrase "serious jeopardy" with the word "death." F.R. at 178. It did not. What the Memo said was that the statutes treat "severe pain as an indicator of ailments that are *likely* to result in permanent and serious physical damage . . . . *Such damage* must rise to the level of death, organ failure, or the permanent impairment of a significant bodily function." Bybee Memo at 6 (emphases added). The import of these sentences is that the pain must be such that accompanies conditions *likely* to result in death or other serious conditions—in other words, pain that accompanies conditions that put a person's health in "serious jeopardy."

OPR's other claims of a "heightened standard" rely on an absurdly narrow parsing of the medical-benefits statutes' language. OPR believes that "serious dysfunction of any bodily organ," for example, may not be paraphrased as "organ failure," and that "serious impairment to bodily functions" may not be paraphrased as "permanent damage." F.R. at 178. OPR gives no explanation for why it thinks these phrases are not equivalent, and many reasonable English speakers would surely think that they are. It is curious that OPR finds it acceptable to paraphrase D.C. Rule 2.1's "honest assessment" requirement as a duty of "thoroughness, objectivity, and candor," but considers it sanctionable for the Bybee Memo to have paraphrased "serious dysfunction of a bodily organ" as "organ failure."

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[38] OPR's effort to distinguish *DOE* so as to fit into its invented, malleable "logical basis" canon also runs into earlier aspects of OPR's own analysis. At the outset, OPR criticizes the Bybee Memo because the medical-benefits statutes do not "define or even describe" severe pain. F.R. at 178. A mere five pages later, in its attempt to escape *DOE*, OPR is forced to concede that one can look to an unrelated statute not just to "define[]" but also to "give[] context to the term."

OPR also contends that the Bybee Memo's analysis was "illogical" because "the intensity of pain that accompanies organ failure or death has no commonly understood meaning." F.R. at 178. But this is a most debatable proposition. The medical-benefits statutes themselves, after all, call for a judgment about whether a "prudent lay person" would think a level of pain is sufficiently severe as to indicate a serious jeopardy to health or bodily functions. And it is certainly not unheard-of to describe the severity of the pain that is required under the torture statute as "agony," even though "agony" can literally precede, and often does precede, death. For example, in interpreting the definition of "torture" in the Torture Victim Protection Act, the D.C. Circuit explained with respect to the meaning of "severe" that "[t]he more intense, lasting, or heinous the agony, the more likely it is to be torture." *Price*, 294 F.3d at 93; *see also id.* at 95 ("excruciating and agonizing"); *id.* at 92 ("The severity requirement is crucial to ensuring that the conduct proscribed . . . is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes"). The court provided no more detailed explanation than that. Just as with the Bybee Memo's description of "severe pain," there is no "readily identifiable level of pain" associated with "agony" that is "intense, lasting, or heinous." But surely OPR would not contend that Judges Edwards, Silberman and Sentelle committed professional misconduct by describing the severity of the pain associated with torture in such terms.[39]

OPR's related contention that there are some forms of death or organ failure "not associated with pain" is beside the point. The Bybee Memo's bottom line was that the pain must be "pain or suffering of the *kind* that is equivalent to the pain that would be associated with serious physical *injury* so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." Bybee Memo at 13 (emphases added). Anyone reading that in context would understand that the Memo is talking about pain from an "injury," *i.e.*, a trauma of the sort that could be inflicted in an enhanced interrogation, not dying in your sleep.

Perhaps most unfairly, OPR alleges that "[t]he Bybee Memo's definition could be interpreted as advising interrogators that they may legally inflict pain up to the point of organ failure, death, or serious physical injury." F.R. at 180. It could not. The Memo says that the pain must rise to the level that "would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions." Bybee Memo at 6. There is no way to interpret this sentence other than that if the pain is equivalent to the pain that accompanies those conditions, the infliction qualifies as torture, whether or not it actually does result in those conditions. It certainly would not be so misinterpreted by the sophisticated legal audience at which the Bybee Memo was directed—especially given the analysis in the Classified Bybee Memo, which carefully examined the level of physical pain caused by the individual interrogation techniques even though *none* of those techniques cause death, organ failure, or serious impairment of bodily functions. *See* Classified Bybee Memo at 9–10 ("With respect to *physical* pain, we previously concluded that 'severe pain' within the meaning of Section 2340 is pain that is difficult for the individual to endure and is of an intensity akin to the pain accompanying serious physical injury.").[40]

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[39] The Bybee Memo had cited the district court's decision in *Price*, which had found the conduct at issue to be torture, in the appendix. It did not cite, however, the D.C. Circuit's opinion reversing that conclusion, possibly because that decision issued a month before the memoranda was signed, after the work was already well underway and the new opinion was overlooked during the paralegal's cite-checking. However the error came to occur, OPR never mentions it. In fact, OPR never cites *Price at all,* even though we previously brought it to its attention. It is not difficult to imagine why: the case strongly supports the memoranda's analysis of "severe pain" but it was an error to omit it from the Bybee Memo. It therefore both supports the memoranda's analysis and also gives the lie to OPR's basic theory that Professor Yoo's supposed "errors," once corrected, consistently undermine the memo's analysis of the torture statute.

Finally, OPR appears to suggest that the phrase "severe pain" is not ambiguous, because "any difficulty in interpreting the term 'severe pain' is more properly attributable to the subjective nature of physical pain, rather than ambiguous language." F.R. at 181 n.135 (quoting Levin Memo at 8 n.18). But pure linguistic ambiguity—*i.e.*, ambiguity arising out of multiple dictionary definitions of the same word—does not exhaust the realm of statutory ambiguity. The classic cases of ambiguous phrases in the administrative-law context have no linguistic ambiguity at all—think, for example, of "just and reasonable" in the rate-setting statutes—but rather ambiguity arising out of the "subjective nature" of the assessment called for by the term. And the Supreme Court would no doubt be surprised to learn that the terms "due process" or "cruel and unusual" are entirely free from ambiguity, or that the phrase "serious potential risk of physical injury to another" in the Armed Career Criminal Act is clear just because its dictionary definition is undisputed, *compare, e.g.*, *James v. United States*, 550 U.S. 192, 209–12 (2007), *with id.* at 227–28 (Scalia, J., dissenting). Moreover, it would be passing strange, to say the least, for OPR to maintain that the phrase "severe pain" is somehow used in a completely *different* way in the medical-benefits statutes but that the phrase itself is *not* ambiguous—and thus necessarily to be given the *same* interpretation in all contexts in which it appears.

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[40] [redacted] But, of course, neither Professor Yoo nor Judge Bybee have anything to do with writing or reviewing [redacted] and they could reasonably assume that their *own* work product would be read in good faith and consistently with its terms by a sophisticated audience even if a particular reader did not read it carefully or willfully disregarded its terms.

It is entirely possible for reasonable lawyers to have good-faith disagreements about difficult and ambiguous concepts such as "severe pain." Persons of good will may equally disagree on the specific question here—*i.e.*, whether the Bybee Memo correctly identified the line that marks conduct beyond which pain becomes sufficiently heinous, excruciating and agonizing to constitute "torture." But no reasonable, fair-minded observer can believe that strongly held views on these questions justify OPR's history of making up legal rules, ignoring precedent, and embracing any and all theories that it believes will justify professional sanctions for attorneys who produced high-quality work under the direst circumstances and in a time of great peril to the Nation. That OPR could so consistently commit pedestrian legal errors in pursuit of this goal is embarrassing. That it is so obviously does so for unworthy motives and without candor or decency is shameful.

C. CAT Ratification History

OPR also asserts that the treatment of the CAT ratification history in the Bybee Memo amounts to professional misconduct. OPR makes two principal arguments in this regard: (1) the Bybee Memo failed to discuss the Bush Administration's withdrawal of the Reagan Administration's understandings concerning common-law defenses, F.R. at 217–19; and (2) the Bybee Memo considered the Reagan Administration's understandings of other aspects of the treaty (in addition to the Bush Administration's), although the Reagan Administration's understandings were not ratified by the Senate, F.R. at 184–86. Neither criticism supports the claim that Professor Yoo committed professional misconduct.

With respect to the first argument, the Bybee Memo clearly identifies the fact that the CAT made an "effort to bar a necessity or wartime defense." Bybee Memo at 41 n.23. But the ratification history of the treaty, which is not self-executing, cannot change the fact that the positive law enacted by Congress did not foreclose common-law defenses. Under our own domestic law the *statute* must be construed in light of the common-law background that defenses are *assumed* to be available. *See infra* Section VI.F.2. Indeed, it is certainly not unusual for criminal prosecutions in the United States to vary from or even violate the international obligations established by treaties. *See generally Medellín v. Texas*, 128 S. Ct. 1346 (2008); *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam). The authors of the Bybee Memo therefore quite reasonably concluded that Congress's failure to incorporate the provision into the criminal statute left the possibility of the defenses open.

Moreover, the Bush Administration's "Explanation" for deleting the understanding concerning common-law defenses was that it was "felt to be no longer necessary," not that the defenses were foreclosed. S. Exec. R. 101-30, at 37 (Aug. 30, 1990). Although citation of the April 4, 2004 Mullin Letter identified by OPR might have improved the Bybee Memo by providing additional context to the discussion, it is not at all clear that the conclusion would have been different. In any event, the emails cited by OPR show that Professor Yoo suggested that [redacted] add a footnote addressing the withdrawal of the understanding after she confirmed her research. F.R. at 218. Those same emails also suggest that [redacted] did not identify or point Professor Yoo to the language in the Mullin Letter that OPR cites. And [redacted] made clear to OPR that she fully resolved any concerns about the defenses sections. *See* F.R. at 50 n.53 [redacted] told us that she ultimately resolved all of her problems with the defenses and concluded that the defenses were applicable to the torture statute."); F.R. at 78 (dismissing concerns of some DOD Working Group members that "necessity defense sweeps too broadly"). This is simply not evidence of professional misconduct.

With respect to the second argument, OPR concedes that the Bybee Memo identified the differences between the Reagan and Bush Administration's understandings (and the fact that the Bush Administration's understandings were the ones ratified by the Senate), but contends that the memo "minimized [the] importance" of the distinctions between the two. F.R. at 185. OPR accuses the Bybee Memo of not revealing that the Bush administration's proposed understanding, defining "torture" as used by the treaty, was different than the Reagan understanding because it was felt that the latter set too low of a standard and reflected a lack of commitment by the United States to the treaty.

OPR vastly over-reads the significance of the CAT ratification history. The Bybee Memo looked to both the Reagan and Bush records merely for confirmation that the definition of torture referred only to *extreme forms* of cruel, inhuman, and degrading treatment. Both administrations were concerned that the terms in the treaty, at times, were vague and open to many different interpretations. Both proposed understandings that differed in wording to address this concern, but they did *not* disagree with the fundamental conclusion that torture was reserved only for extreme acts. This fact should not be surprising or controversial. As the D.C. Circuit has recognized:

> The severity requirement is crucial to ensuring that the conduct proscribed by the Convention and the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. . . . The drafters of the Convention, as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that only acts of a certain gravity shall be considered to constitute torture.

Price, 294 F.3d at 92 (dismissing complaint for failure to state a torture claim where plaintiffs alleged that they were kicked, clubbed, beaten, interrogated, and subjected to physical and mental abuse) (internal quotation marks omitted); *compare* F.R. at 185 (criticizing Bybee Memo for suggesting that "severe pain" is "excruciating and agonizing"), *with Price*, 294 F.3d at 92–93 (noting that "the more intense, lasting, or heinous the agony, the more likely it is to be torture," and citing in support of this statement the Executive's understanding that torture is "specifically intended to inflict excruciating and agonizing physical or mental pain or suffering"). OPR, naturally, does not advert to the D.C. Circuit's decision in *Price*, though we (again) presume that it would not be its position that a unanimous panel of the D.C. Circuit committed misconduct by citing the views of *both* Administrations.

In any event, OPR's claim that the Bybee Memo did not reveal the differences between the Reagan and Bush understandings is simply incorrect. On page 18, the Bybee

Memo clearly identifies the differences in language and states: "The Bush administration said that it had altered the CAT understanding in response to criticism that the Reagan administration's original formulation had raised the bar for the level of pain necessary for the act or acts to constitute torture." The memo specifically cites the same pages of the same source, Judge Abraham Sofaer's prepared testimony before the Senate Committee on Foreign Relations, as does OPR for this observation. *See* F.R. at 185.

OPR takes the view that the Bush understanding was a rejection of the Reagan standard. But OPR does not address statements from the 1990 ratification record, set out in the Bybee Memo, that make clear that the Reagan and Bush administration understandings are not significantly different. Judge Sofaer, for example, testified that "no higher standard was intended" by the Reagan administration than the Bush administration. Bybee Memo at 19. Mark Richard, then a deputy in the Criminal Division, in particular described the Bush understanding in terms which seems to meet the Reagan standard as well: "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." *Id.* (alteration in original). And the written "Explanation" given for the change in the statutory language was simply that it was "[r]evised to clarify the definition of mental harm." S. Exec. R. 101-30, at 36. In the end, it is unclear why OPR attaches particular significance to this alleged difference between the Reagan and Bush administrations. The Bybee Memo quite clearly says that the Bush administration understanding sets the proper definition, making any deviation from the Reagan administration "a purely academic question." Bybee Memo at 19.

D. U.S. Judicial Interpretation

OPR concedes that there were no reported criminal prosecutions under the torture statute for the Bybee Memo to discuss, but faults the memo's treatment of related decisions under (1) immigration regulations implementing CAT Article 3, and (2) the Torture Victim Protection Act. OPR's basic complaint here is that Professor Yoo "ignored" the immigration decisions, which were a "relevant body of case law," and that Professor Yoo's "discussion of the TVPA cases focused on the more brutal examples." F.R. at 186. Since the Bybee Memo *did* in fact discuss the "body of case law" dealing with torture in the immigration context, and the since leading cases before and after the Bybee Memo was issued have affirmed that torture encompasses only "extreme and outrageous acts," *Price*, 294 F.3d at 92, OPR's assertions illustrate nothing so much as the contortions that OPR is willing to undertake to sustain its relentless smear.

First, after grandly asserting that Professor Yoo "*ignored* a relevant body of case law that has applied the CAT definition of torture in the context of removal proceedings against aliens," F.R. at 186, OPR quickly must concede that immigration cases were discussed in the Appendix to the Bybee Memo (making it difficult to understand how anyone could claim that they were "ignored"). But OPR still finds fault with the fact that the underlying immigration regulations were not cited or discussed, and suggests that it was somehow improper to fail to cite two additional Ninth Circuit cases that "provid[ed] *additional examples* of how courts have distinguished between torture and less severe conduct." F.R. at 187 (citing *Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001), *Cornejo-*

Barreto v. Seifert, 218 F.3d 1004, 1016 (9th Cir. 2000), and *Khanuja v. I.N.S.*, 11 Fed. App'x 824 (9th Cir. 2001)) (emphasis added).

It should be apparent to any impartial observer that an attorney's failure to apprise his client of "additional examples" of any legal proposition is a rather novel theory of professional irresponsibility. After all, as OPR is ultimately forced to concede, F.R. at 187 n.140, the Bybee Memo *did* discuss cases interpreting the relevant regulations. For example, *Al-Saher*, one of the cases OPR identifies in support of its argument, is included in the Appendix with a description of the conduct that the court found to be torture. The decision quoted 8 C.F.R. 208.18 and found that the conduct at issue met the regulatory definition. The Bybee Memo cited the case with the parenthetical that it was a "deportation case," clearly marking it as involving immigration. This is far more extensive treatment than OPR itself provides for that case in its Final Report, which cites the case without noting, stating, or discussing anything whatsoever about it beyond the fact that it involved an (undescribed) torture claim. The Appendix to the Bybee Memo also summarized a second case interpreting 8 C.F.R. 208, *Bi Zhu Lin v. Ashcroft*, 183 F. Supp. 2d 551 (D. Conn. 2002). Nor does OPR explain why it believes that the Bybee Memo should have undertaken a completely tangential and immaterial discussion of the immigration regulations themselves as opposed to the case-law under them—it does not identify a single solitary aspect of the immigration regulations that it believes merited particular mention or discussion. OPR's theory is unexplained and inexplicable.

OPR likewise does not discuss the particulars of either *Cornejo-Barreto* or *Khanuja*, which it believes should have been cited as "additional examples." Both are inapposite. *Cornejo-Barreto* considered whether judicial review could extend, via habeas, to decisions by the Secretary of State to extradite fugitives who claim they will be tortured in the foreign country. The Court held that it could so exercise judicial review. It did not interpret the substantive meaning of the regulation, federal laws defining torture, or the Convention Against Torture. It found only that a fugitive could raise in habeas a claim that torture would occur—but it explicitly declared that it would not reach the merits of the petitioner's claim. *Id.* at 1017. *Khanuja*, an unpublished and non-precedential decision, denied a petition for asylum on the ground of religious persecution, not torture, and explained only that religious persecution would not state a claim, by itself, to prevent removal on the grounds of possible torture. For good measure, as Deputy Attorney General Filip informed OPR, a citation to *Khanuja*, an unpublished decision, would have been *sanctionable* under the rules of the Ninth Circuit. R. at 187 n.141; Mukasey Letter at 6 & n.4 (citing cases in which the Ninth Circuit issued orders to show cause why sanctions should not be imposed for citing unpublished decisions). This does not detain OPR, which believes that although citing that case would be grounds for discipline in the court that issued it (*i.e.*, the court one would think most likely to find its intrinsic reasoning impressive), nothing expressly "forbids" citing the case "in executive branch legal memoranda or reports." F.R. at 187 n.141. The best that could be said for this extraordinarily strained argument is that it might conceivably persuade a singularly inattentive reader of the notion that citing *Khanuja* is only *arguably* sanctionable, not indubitably so. It does not remotely show that Professor Yoo departed from professional norms by *failing* to cite this irrelevant unpublished case in the Bybee Memo.

In the end, even OPR understands that its arguments about the immigration cases not only are picayune to the point of absurdity but also cannot overcome the fact that the Bybee Memo *correctly* assessed the relevance of those cases to the inquiry at hand. This is in stark contrast to OPR's own Draft Report, which wholly ignored *Pierre* and *Auguste* in its discussion of intent—where they were incontestably relevant. As OPR puts it:

> The Bybee Memo's failure to discuss the CAT regulations was a relatively minor omission, and we note that the case law and CAT regulations are generally consistent with the Bybee Memo's uncontroversial conclusion that torture is an aggravated from of cruel, inhuman, and degrading treatment. We note the omission here because of our determination that OLC's interpretation of the torture statute in the context of the CIA interrogation program demanded *the highest level of thoroughness, objectivity, and candor*.

Id. at 187 (emphasis added). This paragraph highlights OPR's consistent approach: making pedantic and strained criticisms that do not call into question the analysis or ultimate conclusions of the memo, but that supposedly are relevant to OPR's "just for this case" heightened standard of professional responsibility.

Second, OPR also criticizes the Bybee Memo's treatment of decisions under the Torture Victim Protection Act (TVPA), concluding that the discussion "focused on the more brutal examples of conduct courts have found to be torture, and downplayed less severe examples in the reported decisions." F.R. at 186. OPR is particularly critical of the fact that that the Bybee Memo included an extended discussion of *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), because it believes that two other cases— *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001), and *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78 (D.D.C. 2001)—stand for the proposition that acts "less extreme" than the court confronted in *Mehinovic* could also amount to torture. F.R. at 188–89. OPR also complains that the Bybee Memo was wrong to say that a single blow and its attendant pain, considered in isolation, could not amount to torture, and that if *Mehinovic* were read to stand for that proposition it would be wrong. This is yet another instance of OPR faulting Professor Yoo for giving clearly correct legal advice.

The Bybee Memo made clear that *Mehinovic* was cited because, while most cases provide "limited analysis" of the torture question, *Mehinovic* was a "recent" case that "provide[d] some assistance in predicting how future courts might address this issue." Bybee Memo at 24. Nothing about providing "*some* assistance" in "*predicting*" how courts "*might*" rule in future cases would suggest to a reasonable reader that the case was being proffered as exemplifying the minimum quantum of abuse required to meet the statutory definition of torture. Indeed, the immediately preceding paragraph summarized the extreme types of abusive conduct that had been the subject of judicial rulings but expressly cautioned that "we cannot say with certainty that acts falling short of these . . . would *not* constitute torture under Section 2340 . . . ." *Id.* (emphasis in original). And the memo's discussion of the case concluded by emphasizing "that *Mehinovic* presents, with the exception of the single blow to [one of the victims], *facts that are well over the* *line of what constitutes torture.*" *Id.* at 27.[41] The case was nonetheless useful, the Bybee Memo concluded, in illustrating that TVPA cases "generally . . . are in keeping with the general notion that the term 'torture' is reserved for acts of the most extreme nature." *Id.*

Moreover, both *Daliberti* and *Simpson were* cited and summarized in the Appendix to the Bybee Memo as relevant authorities, so OPR's complaint—an *ethical* complaint, no less is—is that Professor Yoo cited and discussed all the TVPA authorities that OPR believes were relevant but his judgments about appropriate emphasis (and on which cases would be most informative for the client) does not accord with OPR's. Moreover, OPR's contention that both cases were obviously "less extreme" than *Mehinovic* is also rather subjective. In *Daliberti*, Iraqi guards attempted to execute one of the plaintiffs and threatened another with undeniable acts of torture, 146 F. Supp. 2d at 22–23, while *Simpson* also involved death threats and interrogation during prolonged incommunicado detention, 180 F. Supp. 2d at 81. Indeed, even if the Bybee Memo were read as asserting that the conduct in *Simpson* was not torture, it would be *correct*: the district court's opinion was unanimously *reversed* by the D.C. Circuit after the issuance of the Bybee Memo upon a finding that the acts in question did *not* amount to torture. The D.C. Circuit explained that "[a]lthough these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators, they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture within the meaning of the Act." *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (per Sentelle, J., joined by Henderson and Tatel, JJ).

OPR devotes almost an entire page of its Final Report to discussing the *district court's* decision in *Simpson* but notes only in the briefest of footnotes that the decision was reversed. F.R. at 189 & n.144. If the placement of authority in footnotes or appendices, as opposed to text, or the extensiveness of the discussion given to one versus the other *were* an ethical issue that calls for bar discipline, it is doubtful that the authors of the Final Report would ever again be permitted to leave the office of the bar's disciplinary counsel. But OPR's reasons that the D.C. Circuit opinion is simply not relevant to the analysis because it was "issued . . . after the Bybee and Yoo Memos had been issued." *Id.* The country's leading ethics experts disagree with OPR on its rather counterintuitive position that decisions that clearly prove the Bybee Memo correct must be wholly disregarded in assessing the adequacy of the advice given merely because they were not yet available at the time the memo was written. *See* Rotunda Letter at 3; Hazard Letter at 3.

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[41] It is also obvious why it would make sense to discuss *Mehinovic* in some detail by way of example: Not only was it one of the more extensive opinions on the TVPA, but it also involved multiple claims of torture by multiple victims each of whom was subjected to various forms of abuse. It also reached important questions even though it did not attempt fully to delineate the meaning of torture. Unlike most opinions, for example, it explained the difference between torture and cruel, inhuman, or degrading treatment that did not rise to the level of torture. And it also considered whether torture could occur through the cumulative effect of individual acts that, standing alone, would not violate the statute.

In any event, the advice was clearly correct under the law as it existed even when the memo was written: The D.C. Circuit's decision in *Simpson* applied and quoted extensively from its earlier decision in *Price*, which *preceded* the Bybee Memo by a month. As *Simpson* noted, *Price* had already held that "'[t]orture does not automatically result whenever individuals in official custody are subjected even to direct physical assault.'" *Simpson*, 326 F.3d at 234 (quoting *Price*, 294 F.3d at 93). The allegations that *Price* had held *in*sufficient to state a claim for torture included the facts that the plaintiffs were "kicked, clubbed and beaten," "interrogated and subjected to physical, mental and verbal abuse," and "held in deplorable conditions while incarcerated, including urine-soaked mattresses, a cramped cell with substandard plumbing that they were forced to share with seven other inmates, a lack of medical care, and inadequate food." *Price*, 294 F.3d at 86. *Price* emphasized that there is an important distinction between "actual torture" and "mere police brutality," and concluded that the facts pleaded did not "reasonably support a finding that the physical abuse allegedly inflicted by Libya evinced the degree of cruelty necessary to reach a level of torture." *Id.* at 93, 94. Never once in its report does OPR mention the D.C. Circuit's opinion in *Price*. Not once.

In sum, OPR goes to great lengths to manufacture criticisms that ignore the numerous caveats expressed by the Bybee Memo about how courts were likely to deal with claims of torture under the TVPA, and never comes anywhere close to impugning the Bybee Memo's basic conclusion that cases under the TVPA "are in keeping with the general notion that "torture" is reserved for acts of the most extreme nature." Bybee Memo at 27. That statement of the law was, and remains, wholly and unquestionably correct.

E. International Decisions

OPR objects to the Bybee Memo's discussion of two decisions from foreign tribunals: *Ireland v. United Kingdom*, a decision of the European Court of Human Rights, and *Public Committee Against Torture in Israel v. Israel*, a decision of the Israeli Supreme Court. F.R. at 190. Although OPR apparently reads this section as an incomplete effort to assess "international opinion" and comprehensively survey international law, *id.*, the Bybee Memo makes clear at the outset that these decisions were being discussed simply to illustrate how other Western countries have understood the distinction between "torture" on the one hand and "cruel, inhuman, and degrading treatment" on the other: "International decisions can prove of some value in assessing what conduct might rise to the level of severe mental pain or suffering. . . . As this Part will discuss, other Western nations have generally used a high standard in determining whether interrogation techniques violate the international prohibition on torture." Bybee Memo at 27 (also noting that while international decisions "can prove of some value," they are "in no way binding authority upon the United States"). OPR does not argue that this conclusion is mistaken, nor does it explain why consultation of these opinions in this way violated professional norms.

Perhaps more significantly, OPR condemns Judge Bybee and Professor Yoo for discussing these cases, but fails to grapple with its own factual finding that the limited discussion was included in response to a direct request by the CIA: "The CIA personnel at the meeting asked Yoo for guidance on the legality of their plan under the torture statute, the CAT, and *European and Israeli case law*." F.R. at 41 & n.45 (noting that "the reference was clearly to the two cases referenced above – *Ireland v. United Kingdom* and *PCATI v. Israel*") (emphasis added). OPR's indictment of Professor Yoo and Judge Bybee for including a discussion of these particular cases, when the CIA had made a specific request for their inclusion, is simply baffling.

OPR's quibbling critiques of the section are similarly misdirected. For example, OPR compiles a list of five "important facts" related to *Ireland v. U.K.* that the Bybee Memo "ignored" and that OPR contends would have been included in a "thorough, objective, and candid examination" of the case. F.R. at 191–92. But OPR's first three facts—that an investigating commission found the techniques to be torture and the U.K. did not contest the finding, that an internal U.K. review found the techniques to be prohibited by domestic law, and that the U.K. renounced further use of the techniques—are utterly irrelevant to *the court's* determination that the methods did not constitute torture within the meaning of the law. And the fourth and fifth items on OPR's list, which fault the Bybee Memo for not describing the *dissenting* opinions in the European Court of Human Rights and for not stating that the majority held that Great Britain's interrogation methods violated the European Convention on Human Rights, are similarly without merit. Whether to mention a dissent or not is a matter of judgment; American lawyers and judicial opinions regularly discuss precedent without delving into the dissents. And OPR's claim that the Bybee Memo did not disclose that the European Court had found Great Britain's methods to violate the European Convention is simply mistaken. The Bybee Memo says that the European Convention prohibits both torture and cruel, inhuman, and degrading treatment, Bybee Memo at 27–28, and it states clearly that the "European Court of Human Rights concluded that these techniques used in combination, and applied for hours at a time, were inhuman and degrading but did not amount to torture." *Id.* at 29.

OPR additionally faults the Bybee Memo for not including a discussion of every subsequent European Court case considering *Ireland v. U.K.* But OPR does not contest the Bybee Memo's conclusion that *Ireland* is the "leading" European Court of Human Rights Case, *see* Bybee Memo at 28, and OPR admits (albeit in a footnote) that "[m]uch of that case law in fact *supports* the uncontroversial conclusion that the term 'torture' should be applied to more severe forms of cruel, inhuman and degrading treatment." F.R. at 192 & n.147 (emphasis added). Although OPR suggests that a subsequent case "raised questions about the continuing validity" of *Ireland*, F.R. at 193 (citing *Selmouni v. France*), a review of that case reveals that it repeatedly cites the *Ireland* case *favorably*. That it included some general language (not tied to *Ireland*) about the European Convention being a "living document" that might be interpreted differently over time does nothing to undermine the Bybee Memo's discussion of *Ireland*. In any event, failure to discuss such vague *dicta* does not even remotely suggest professional misconduct. OPR's criticisms are inexplicably trifling.

OPR's treatment of the Israeli case is similarly tendentious. OPR takes issue with the Bybee Memo's statement that the Israeli case is best read as finding that the five Israeli interrogation techniques challenged therein did not amount to torture, calling this conclusion "misleading." F.R. at 194. But the Bybee Memo concedes that "[t]o be sure, such a conclusion [regarding whether the techniques at issue amounted only to torture] was unnecessary [to the court's decision] because even if the acts only amounted to cruel and inhuman treatment the GSS lacked authority to use the five methods." Bybee Memo at 30. Rather, the memo relied, *inter alia*, on the fact that "the court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture" in reaching its conclusion. *Id.* Indeed, OPR points to nothing in the Israeli opinion that describes any of the interrogation methods as rising to the level of torture, and the language used in the opinion in fact supports the Bybee Memo's conclusion. *See, e.g., PCATI* at ¶ 25 (concluding that stress position technique is "degrading"); ¶ 30 (favorably citing *Ireland* for the proposition that a "similar" combination of interrogation methods were "inhuman and degrading"). Of course, the case was also relevant in light of the Israeli Supreme Court's observation that otherwise impermissible interrogation methods can be justified by necessity in appropriate circumstances. In the end, while OPR's convoluted criticisms would be the envy of a professional contortionist, they add nothing of substance to OPR's claim that Professor Yoo violated ethical norms.

F. Commander-in-Chief Power and Possible Defenses

OPR takes issue with the Bybee Memo's discussion of the Commander-in-Chief powers and of possible defenses to a torture prosecution based on its conclusion that "it appears likely that the sections were added, following a discussion among the OLC and White House lawyers, to achieve indirectly the result desired by the client—immunity for those who engaged in the application of EITs—after [DOJ Criminal Division head Michael] Chertoff refused to provide it directly." F.R. at 198–99. But how a discussion of *possible* defenses to torture, and a power that everyone agrees must be invoked by the President himself, could possibly provide "immunity" to anyone is never addressed by OPR. Nor does OPR point to a single shred of *evidence* suggesting that anyone at the CIA thought that the Bybee Memo permitted interrogators to violate the torture statute with impunity. This is because the evidence is beyond clear that everyone involved understood that any interrogation techniques amounting to torture were flatly prohibited. Moreover, OPR fails to explain how these sections could have been added and then reviewed by Michael Chertoff without objection if their transparent purpose was to circumvent his decision not to provide an "advance declination" to the CIA.

OPR also dismisses the evidence that OLC's client requested a discussion of these matters in the memorandum. The Bybee Memo itself begins the constitutional discussion by referencing "your request for legal advice." Bybee Memo at 31. Moreover, while OPR credits David Addington's testimony before the Judiciary Committee that he was pleased to hear the memorandum would address constitutional issues and potential defenses, it is dismissive of Mr. Addington's more relevant and direct answers that explain *why* he might have felt that way—*i.e.*, that he had *asked* for these issues to be covered. In particular, Mr. Addington explained in his House testimony that, in his official capacity, he was "essentially . . . the client on this opinion," and he responded to criticism of the Bybee Memo's discussion of the constitutional issue and "the defenses of necessity and justification" thusly: "[i]n defense of Mr. Yoo, I would simply like to point out that [this] *is what his client asked him to do.*" *From the Department of Justice to*

Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part III), Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 110th Cong., No. 110-189, at 42, 38 (June 26, 2008). ("House Hearing") (emphasis added). Even the evidence on which OPR relies is to the same effect; it shows that Professor Yoo initially determined not to discuss these subjects in the Bybee Memo, but that he changed course after a mid-July meeting at the White House and, in an obvious reference to the client's wishes, advised a colleague who inquired about these new issues that "they want it in there." F.R. at 197.

But OPR roundly rejects, apparently for argument's sake only, David Addington's testimony that the sections were added at client request (notwithstanding the fact that OPR believes Addington "possibl[y]" was present at the July 16 meeting in which it believes the decision was made to add the sections). F.R. at 198 n.152; *id.* at 52. Instead, OPR's offers a more "nuanced" conclusion: "it is *likely* the sections were added because some number of attendees at the July 16 meeting requested the additions, *perhaps* because the Criminal Division had refused to issue any advance declinations." F.R. at 52 (emphases added). [redacted] (in fact, the Bybee Memo was addressed to White House Counsel, and later Attorney General, Alberto Gonzalez, the only person beyond Professor Yoo who OPR is *sure* attended the July 16 meeting, F.R. at 52). But the second part of OPR's conclusion—its rank speculation that the sections were nefariously added to circumvent Michael Chertoff's rejection of advance declinations requested by the CIA, [redacted]—cannot withstand scrutiny given that the sections *were added and then promptly presented to Chertoff himself* for his review and that he did review them without objection, F.R. at 59, and that John Rizzo did not interpret the sections as any sort of advance declination, Rizzo Letter ¶ 5 ("[I] did not interpret the 2002 Bybee Memos to mean . . . that the interrogators would be immune from prosecution if they crossed the careful lines drawn in the [Classified Bybee Memo].").[42]

In any event, as Mr. Addington noted before the House of Representatives, "it is the professional obligation of the attorney to render the advice on the subjects that the client wants advice on." *From the Department of Justice to Guantanamo Bay, supra*, at 42. And OPR rightfully does not contend that it can be professional *misconduct* for an attorney to consider the issues that the client wants considered. It is certainly far from odd or surprising, moreover, that in a time of great national emergency the White House would seek advice on any and all conceivable legal theories that might become relevant to the President's exercise of the duties of his office in the crisis. Most citizens presumably would expect their government to do just that, and few outside OPR would conclude from this that it is *therefore* "likely" that the highest echelons of our government are engaged in a criminal conspiracy. Nor would most reasonable observers believe that the strength of this inference is *increased* by virtue of the fact that the attorneys involved in providing the legal advice at issue expressly *rejected* the "advance declination." To put it most charitably, OPR's attempt to draw these outlandishly strained inferences primarily on the basis of the timing of edits to the Bybee Memo could not possibly satisfy *any* evidentiary standard. The only inference that any fair-minded observer can draw from OPR's insistence on this sort of rank partisan speculation is that OPR is not willing to engage even in a pretense of objectivity.

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[42] OPR's assertion that discussion of potential common-law criminal defenses was not sought by the client is undermined not only by the sworn testimony of David Addington, but by the CIA's interest in the issues. [redacted] That the CIA had identified necessity and self-defense as significant issues before February 1, 2002 is an important fact, as OLC was not brought into the discussions until April 2002. F.R. at 37. Although individuals' memories may fade over time as to who requested what sections and when, this email demonstrates quite clearly that this was a question the CIA was asking before OLC ever became involved.

And OPR presents no evidence that the discussion of Commander-in-Chief powers or possible defenses ever reached (or were even intended to reach) interrogators in the field, or that anyone ever misinterpreted these sections to authorize techniques beyond those repeatedly determined to be lawful under the statutory analysis. OPR simply overreaches in its criticisms of these sections.

1. Commander-in-Chief Power

OPR boldly declares, despite its earlier statement that it had not determined whether the memos' conclusions were correct, that the Bybee Memo's determination that the torture statute "'does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority' *was wrong*." F.R. at 201 (quoting Bybee Memo at 35) (emphasis added). OPR's analysis is not merely incorrect as a matter of constitutional law and American history, but it also flies in the face of decades of settled OLC precedent. If OPR's view of the Commander-in-Chief power were adopted, it would result in a substantial narrowing of the Department of Justice's position on the scope of the President's constitutional authorities. OPR does not recognize this fundamental flaw, for it ignores years of internal Executive Branch precedent and practice, and appears not to have considered public OLC memos on presidential power stretching back several administrations. OPR seems equally indifferent to unpublished OLC opinions that, according to Professor Yoo, rely on the Commander-in-Chief clause as the source of significant authority to conduct military and intelligence operations in defense of national security.

OPR thus condemns the Bybee Memo's discussion of executive power without the faintest conception of the background understanding that OLC lawyers bring to issues involving the Commander-in-Chief power. OPR, it appears, has not even attempted to immerse itself in OLC practice and precedent, and the result is a host of basic errors. *Compare* Principles Memo at 3 ("OLC routinely, and appropriately, considers sources and understandings of law and fact . . . such as previous . . . OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch.").

First, OPR contends that the Bybee Memo "should have considered an alternate approach that reconciled the Commander-in-Chief clause with the Take Care clause."

F.R. at 204. But while the question of the relationship between the Take Care clause and other presidential responsibilities may seem novel to OPR, it has long been settled at OLC. Unmentioned by OPR is that Clinton OLC chief Walter Dellinger had previously stated OLC's position on this issue in a carefully considered opinion that would be well known to anyone working at OLC (and that should be known to any attorney at OPR who contends that the work of that office is unethical). Relying on the same analysis justifying the establishment of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Dellinger explained that a statute that violates the Constitution is unenforceable, because the Constitution is the highest form of law. *See* Memorandum for the Honorable Abner J. Mikva, Counsel to the President, From Walter Dellinger, Assistant Attorney General, *Re: Presidential Authority to Decline to Execute Unconstitutional Statutes* at 2 (Nov. 2, 1994). The President's responsibility to take care that the laws be faithfully executed, therefore, requires him *not* to enforce unconstitutional statutes, because in doing so he would be violating the Constitution.

That principle applies with special force to statutes that violate the separation of powers. "The President," Dellinger wrote, "has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency." *Id.* Moreover, "[i]f resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency. *This is usually true, for example, of provisions limiting the President's authority as Commander in Chief.*" *Id.* at 3 (emphasis added).

OPR shows no knowledge of the long-settled OLC view embodied in Dellinger's analysis and instead blindly faults the Bybee Memo for not re-plowing the same ground. Nor does OPR venture to suggest what "alternate approach" the Bybee Memo should have taken, presumably because the only such approach would be to interpret the Take Care clause to require the President to enforce unconstitutional laws. It appears that OPR simply thumbed through a pocket copy of the Constitution in search of constitutional provisions that the Bybee Memo did not discuss. The idea that OPR's unresearched and poorly thought-out critique could be the basis of professional discipline (at least of someone other than the OPR attorneys who wrote it) would be risible if it did not carry such serious consequences for Professor Yoo's reputation.

Second, OPR criticizes the Bybee Memo for failing to include an extended discussion of Congress's constitutional authority to enact Section 2340 under its Article I powers. F.R. at 202. The issue addressed by the Bybee Memo, however, was not whether Congress lacked constitutional power *simpliciter* to enact the statute, but whether particular applications of the statute to actions taken personally by the President as Commander in Chief would comport with Article II.

The longstanding view of the Department of Justice has been that the President's Commander-in-Chief power gives him *exclusive* authority over the deployment and operation of the armed forces and the protection of national security. In cases where Congress has invoked related powers in an attempt to limit the President's discretion in these areas, the Department has consistently defended presidential prerogative. Conflicts between presidential and congressional authority thankfully have been rare, but when they have arisen, the Department of Justice generally has resolved them as the Bybee memo did—in favor of the President.

The Department's view of the Commander-in-Chief power was stated most eloquently by Attorney General Robert Jackson—the author of the *Youngstown* concurrence that OPR criticizes the Bybee Memo for not citing. In a 1941 opinion, Jackson wrote that under the Commander-in-Chief clause, the President "has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States." Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61 (1941). This power, he said, which "exist[s] in time of peace as well as in time of war," is one 'with which Congress cannot interfere.'" *Id.* (quoting 1910 constitutional-law treatise). Even at the time that Jackson wrote his opinion, this understanding of the President's broad power to ensure the Nation's security had a long pedigree. *See* Censorship of Radio Stations, 30 Op. Att'y Gen. 291, 292 (1914) ("In the preservation of the safety and integrity of the United States and the protection of its responsibilities and obligations as a sovereignty," the President's "powers are broad," including the enforcement of "the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution." (quoting *In re Neagle*, 135 U.S. 64 (1890))).

In the few cases when the President's Commander-in-Chief power has come into conflict with the powers of Congress, the Justice Department has not hesitated to defend the executive's authority. Perhaps the best-known direct and serious intrusion by Congress is the War Powers Resolution, which declares that the President may deploy U.S. armed forces only pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack on the United States. OLC opinions have consistently rejected the argument that the War Powers Resolution could limit a military deployment ordered by the President. OLC's Assistant Attorney General in the Carter Administration wrote, for example, that "constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power" in the President to initiate military operations. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 190 (1980). Likewise, in 1984, Reagan's OLC chief opined that Section 2(c) of the War Powers Resolution "does not constitute a legally binding definition of Presidential authority to deploy our armed forces." Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 275 (1984). The President's constitutional authority to defend the Nation, these opinions reasoned, trumped any countervailing congressional power to prevent the initiation of hostilities.

Professor Yoo has informed us that OLC opinions have been equally vigorous in supporting the President's right to order covert actions by the Central Intelligence Agency even in the face of a federal statute—the very power at stake in the Bybee Memo. Many of these opinions are classified and are not available to counsel and the parties in this action, and certainly seem to be utterly unknown to OPR's investigators. But in 1986, for example, OLC concluded that the National Security Act's requirement that the President provide timely notification of covert actions could not constitutionally limit President Reagan's decision to secretly engage in covert actions designed to free American hostages in the Middle East. OLC observed that the President possesses "inherent" and "plenary" constitutional authority in the field of international relations, and that secret diplomatic and intelligence missions sit at "the core of the President's inherent foreign affairs authority." The President's Compliance with the "Timely Notification" Requirement of Section 501(B) of the National Security Act, 10 Op. O.L.C. 159, 160–65 (1986). It concluded that "any statute infringing upon the President's inherent authority to conduct foreign policy would be unconstitutional and void." *Id.* at 168; *see also* Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 259 (1989) ("At a minimum," the President's executive power "encompasses the authority to direct certain covert actions without first disclosing them to Congress, among which are those actions necessary to protect the lives and property of Americans abroad.").

In the wake of September 11th, OLC relied on this firmly established view of the President's plenary authority in the realm of national security to approve the establishment of military commissions to try members of al Qaeda and the Taliban for war crimes. *See* Memorandum Opinion for the Counsel to the President, From: Patrick F. Philbin, Deputy Assistant Attorney General, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001). "One of the necessary incidents of authority over the conduct of military operations in war," OLC said, "is the power to punish enemy belligerents for violations of the laws of war." *Id.* at 7. Moreover, if the Uniform Code of Military Justice "were read as restricting the use of military commissions and prohibiting practices traditionally followed, it would infringe on the President's express constitutional powers as Commander in Chief." *Id.* at 5. That logic is analogous to that used by the Bybee Memo's, but its author has not been subject to reproach by OPR.[43]

In short, OPR's charge that Professor Yoo committed professional misconduct by failing to discuss countervailing congressional powers ignores the background understanding of the President's Commander-in-Chief power that would have been familiar to any OLC attorney. OPR appears to believe that it is an open question within OLC whether a President's exercise of the Commander-in-Chief power is subject to limitation by Congress. Indeed, OPR's apparent view of the interaction between the Commander-in-Chief power and congressional authority would mean that the War Powers Resolution is constitutional, a conclusion directly contrary to the consistent view of Presidents from Richard Nixon to George W. Bush. *See* Richard F. Grimmett, Congressional Research Service, Library of Congress, *War Powers Resolution: Presidential Compliance* 1 (2009) (noting that "every President has taken the position" that the War Powers Resolution unconstitutionally abridges the Commander-in-Chief power). But as an OLC attorney, Professor Yoo was justified in presuming that if the interrogation of enemy combatants falls within the core of the Commander-in-Chief power—as the Bybee Memo argued that it does—then it trumps any exercise of congressional power that purports to limit it.

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[43] The prevailing Executive Branch view is consistent with the few occasions when the Supreme Court has addressed the President's power over foreign affairs and national security. It should be initially acknowledged, as OPR seemingly fails to understand, that the decisions of the Court in this area are "rare, episodic, and afford little precedential value for subsequent cases." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). But the few relevant Supreme Court cases have confirmed the President's authority. In *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), for example, the Supreme Court upheld President Lincoln's decision to impose a blockade on Southern ports without congressional authorization, because, as the Court explained, the President has the constitutional authority to "determine what degree of force the crisis demands." *Id.* In recent decisions the Court has continued to adhere to "the generally accepted view that foreign policy was the province and responsibility of the Executive." *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (internal quotation marks omitted).

Third, and relatedly, OPR faults the Bybee Memo for not discussing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)—presumably Justice Jackson's concurrence laying out a three-part framework for analyzing separation-of-powers disputes (although OPR does not itself cite the concurrence). F.R. at 204. Rarely, however, do OLC opinions include an extensive discussion of the *Youngstown* framework, because its principles are so well understood. Dellinger, for example, did not analyze conflicts between Article II and Congress's powers using the *Youngstown* framework when he advised President Clinton that the President is authorized to decline to enforce unconstitutional statutes. Instead, he cited Justice Jackson's concurrence for a principle directly counter to the one advanced by OPR: the "existence of [the] President's authority to act contrary to a statutory command." Memorandum for the Honorable Abner J. Mikva, Counsel to the President, From: Walter Dellinger, Assistant Attorney General, *Re: Presidential Authority to Decline to Execute Unconstitutional Statutes* at 1 (Nov. 2, 1994). And in June of this year, when the current OLC advised President Obama that he could disregard a law that restricted State Department officials from meeting with certain U.N. agencies, it cited *Youngstown* only in a footnote—and then not for its signature analysis of how to reconcile overlapping presidential and congressional authority, but rather only for the basic proposition that Article II's Vesting Clause grants the President power over foreign relations. *See* Memorandum for the Acting Legal Adviser Department of State, From: David J. Barron, Acting Assistant Attorney General, *Re: Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act* at 5 n.6 (June 1, 2009).

It is unsurprising that when addressing core military and foreign-affairs powers of the President, OLC opinions would not discuss *Youngstown* in any detail or at all. That is because—certainly from the institutional perspective of OLC—any exercise of those powers falls undisputedly in Category 3 of Justice Jackson's framework (the category of powers that override congressional authority). As Judge Bybee told OPR, the authors "recognized that we're in Category 3, Congress has enacted a statute that might interfere with the Commander in Chief's authority." F.R. at 204 n.157. In contrast to the *domestic* seizure of steel factories, which was the presidential action at issue in *Youngstown* (although one would never know it from OPR's report), the interrogation of *foreign* enemy prisoners of war lies at the core of the Commander-in-Chief power. The Bybee Memo had no more need to cite *Youngstown* than the average federal judicial opinion has a need to cite the basis for the court's power of judicial review. Indeed, OPR has not identified what exactly it believes the memo should have said about *Youngstown* beyond "acknowledg[ing] its relevance." F.R. at 204.

That OPR has not figured out exactly what the Bybee Memo should have said about *Youngstown* is unsurprising. Its view is apparently cribbed entirely from Professor Goldsmith's criticism that the Bybee Memo did not adequately consider "case law such as *Youngstown*." F.R. at 205. But while Professor Goldsmith—who, it bears repeating, believes that Professor Yoo acted in good faith and did not commit professional misconduct—is entitled to his view, Professor Yoo's decision not to cite *Youngstown* is far more consistent with OLC precedent. A review of Clinton-era OLC opinions addressing conflicts between a statute and the President's foreign-policy and military authority, for example, shows that they almost *never* cited *Youngstown* in finding that presidential authority prevailed:

- In 1996, OLC declared unconstitutional a proposed funding rider that prohibited the placement of U.S. troops under United Nations commanders. *See* Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, From: Walter Dellinger, Assistant Attorney General, *Re: Placing of United States Armed Forces Under United Nations Operational or Tactical Control* (May 8, 1996). Dellinger wrote that "there can be no room to doubt that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces." *Id.* at 2–3. Despite Congress's authority to raise and regulate the military (powers that OLC mentioned, but did not analyze), OLC concluded that Congress, in exercising its power to regulate the armed forces, "may not unduly constrain or inhibit the President's authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field." *Id.* at 3. OLC also concluded that Congress's ban would interfere with the President's "constitutional authority with respect to the conduct of diplomacy" because he would be unable to fulfill agreements to use force abroad with other countries. Notably, Congress's restriction here was done through the appropriations power, considered much more basic to the legislative power than almost any other. OLC did not mention *Youngstown* at all.

- In 1995, OLC advised the White House that the President could order troops into Bosnia under his authority as Commander in Chief. Memorandum Opinion for the Counsel to the President, From: Walter Dellinger, Assistant Attorney General, *Re: Proposed Deployment of United States Armed Forces into Bosnia* (Nov. 30, 1995). OLC concluded that the President could deploy troops without congressional authorization, even if hostilities were to occur, because the War Powers Resolution could not limit the President's authority. "The Executive Branch has traditionally taken the position that the President's power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the Resolution." *Id.* at 7. Once again, OLC did not mention *Youngstown*.

- In 1993, OLC advised the Attorney General that she could authorize the transfer of grand-jury information to the President and the members of the National Security Council. Memorandum for the Attorney General, From: Walter Dellinger, Assistant Attorney General, *Re: Disclosure of Grand Jury Matters to the President and Other Officials* (Sept. 21, 1993). Federal Rule of Criminal Procedure 6(e) prohibits disclosure of information obtained by grand jury except, *inter alia*, to other government officials who assist in the enforcement of federal law. OLC found that the President and NSC officials could fall within this exception, but that even if they did not, "the Attorney General's disclosures of such materials to the President could in some circumstances be authorized on broader constitutional grounds," including his authority to enforce the laws and defend the country from terrorist attack. OLC did not cite or discuss *Youngstown* in arguing that Rule 6(e) could be placed aside in the event of a terrorist threat to national security, even though the Supreme Court has made clear that the Federal Rules of Criminal Procedure are, "in every pertinent respect, as binding as any statute duly enacted by Congress." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988).

- In 1997, OLC issued an opinion that extended this reasoning to disclosing grand-jury information to the intelligence community. Memorandum for the Acting Counsel, Office of Intelligence Policy and Review, From: Richard L. Shiffrin, Deputy Assistant Attorney General, *Re: Disclosure of Grand Jury Material to the Intelligence Community* (Aug. 14, 1997). OLC answered in the affirmative when asked whether such material could be "disclosed to Intelligence Community officers where the information in question is urgently relevant to a matter of grave consequences for national security or foreign relations." In explaining its reasoning, OLC said that "we believe such disclosure would rest upon the same fundamental constitutional principle that has been held to justify government action overriding individual rights or interests in other contexts where the action is necessary to prevent serious damage to the national security or foreign policy of the United States. *See generally Haig v. Agee*, 453 U.S. 280, 309 (1981) (invoking the principle that the Constitution's guarantees of individual rights do not make it a 'suicide pact'); *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 408 (1950) (to the same effect)." Like the 1993 opinion, the 1997 opinion did not cite or discuss *Youngstown*.

- In 2000, OLC advised the Office of Intelligence Policy and Review that information obtained through a Title III warrant could be shared with officials of the CIA. Memorandum for the Counsel, Office of Intelligence Policy and Review, From: Randolph D. Moss, Assistant Attorney General, *Re: Sharing Title III Electronic Surveillance Material with the Intelligence Community* (Oct. 17, 2000). OLC found that if the CIA were to help in the investigation of a crime, disclosure would fall within an exception to Title III's prohibition on disclosure of such information. OLC also held, however, that the Department of Justice could share Title III surveillance with the CIA even beyond the law-enforcement context because of the President's constitutional authority as Commander-in-Chief and Chief Executive. Its 2000 opinion declared, "we believe that in extraordinary circumstances electronic surveillance conducted pursuant to Title III may yield information of such importance to national security or foreign relations that the President's constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III." OLC explicitly said that Title III would be unconstitutional if it were to prevent the President from transferring surveillance information to protect the national security. "Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be 'subject to an implied exception in deference to such presidential powers.' We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, it would be unconstitutional as applied in those circumstances." *Id.* (citation omitted). Once again, the opinion did not cite or discuss *Youngstown*.

- In 1995, OLC advised the Counsel to the President that legislation relocating the American embassy in Israel to Jerusalem was unconstitutional. Memorandum for the Counsel to the President, From: Walter Dellinger, Assistant Attorney General, *Re: Bill to Relocate United States Embassy from Tel Aviv to Jerusalem* (May 16, 1995). OLC found that the provision, which Congress attached to the State Department appropriations bill for fiscal year 1995, would "impair the President's constitutional authority to determine the form and manner of the Nation's diplomatic relations." The opinion did not cite to *Youngstown* or discuss whether Congress's use of its appropriations power made a difference in the analysis.

- In 1996, OLC issued an opinion to the State Department that Congress could not place conditions on funds appropriated for diplomatic activities with Vietnam. Memorandum for Conrad Harper, Legal Adviser, Department of State, From: Walter Dellinger, Assistant Attorney General, *Re: Section 609 of the FY 1996 Omnibus Appropriations Act* (May 15, 1996). The statute, passed as part of an appropriations bill, required the President to make a certification that Vietnam was cooperating in full faith on initiatives to find and recover American POWs. According to OLC, the provision, "taken as a whole, impermissibly impairs the exercise of a core Presidential power—the authority to recognize, and to maintain diplomatic relations with, a foreign government." OLC declared the rider "unconstitutional and without legal force or effect." It did not cite or discuss *Youngstown*.

- In 1996, OLC advised the White House that legislation prohibiting modification of the Anti-Ballistic Missile Treaty with the Soviet Union, without use of the treaty process, raised serious constitutional questions. Memorandum for the Counsel to the President, From: Walter Dellinger, Assistant Attorney General, *Re: Constitutionality of Legislative Provision Regarding ABM Treaty* (June 26, 1996). The administration took the view that the successor states to the defunct Soviet Union remained parties to the ABM Treaty. OLC found that legislation that required the President to submit extension of the agreement to the successor states as a treaty amendment "would act in derogation of the President's recognition power. Because the recognition power is exclusively Presidential, it is doubtful that Congress may take that step." The 1996 Opinion neither discussed nor cited *Youngstown.*

Fourth, OPR relies on a handful of sources, primarily secondary, to claim that "[t]orture has not been deemed available or acceptable as an interrogation tool in the Anglo-American legal tradition since well before the drafting of the United States Constitution." F.R. at 201. But the authority that OPR cites is at best marginally relevant and does not support that assertion: (1) a British judicial opinion from 2005, which could not possibly be an authoritative source on the intentions of the framers; (2) an article by a legal philosopher who is not an expert on the American Constitution, the separation of powers, or legal history and makes no claims about the understanding of the Framers[44]; and (3) an article in Pepperdine Law Review by an assistant professor who makes the claim, contrary to settled law, that the Eighth Amendment applies beyond post-conviction punishment.

Of course, no one at OLC was suggesting that the legal analysis in the interrogation memoranda established that the President could authorize "torture"; the whole point of the exercise was to identify a line that would keep interrogators from violating the particular understanding of torture reflected in § 2340. And, given the statutory language, one could certainly conceive of circumstances close to the line, where the conduct at issue might later be viewed as just-over rather than just-under. If the President in such circumstances had personally undertaken to order the interrogation on his own authority, his constitutional power as Commander in Chief could well be held sufficient to override the statute as applied. It is certainly surprising that the Executive Branch would take a different view, irrespective of which party controls the White House, and categorically rule out for all eternity the exercise of such authority even in the direst of circumstances, when the lives of thousands or even millions of our citizens may be at stake.

More critically, even if the discussion had been about whether the President could order conduct that qualifies as "torture" under any conceivable definition, any historical norm against torture would not resolve the question posed by the Bybee Memo: *which branch* has the constitutional authority in a military conflict to determine what sort of interrogation methods may be used. As Professor Yoo attempted to explain to OPR in his interview—although it evidently fell on deaf ears—a "parade of horribles" does not "answer[] the Constitutional question, because I could easily . . . flip them all and say Congress ordered them to [torture detainees]. And then you would say, well, Congress shouldn't have that power." July 11, 2005 Yoo Tr. at 120. In other words, if a norm against torture did have significance in the constitutional analysis, it could mean only that

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[44] The writer in question, Professor Jeremy Waldron, in fact says quite clearly that "There is no question that [torture] could be introduced into our law, directly by legislation, or indirectly by so narrowing its definition that torture was being authorized de jure in all but name," and instead objects because such would be "contrary to the genius and spirit of our law." Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1719 (2005) (internal quotation marks omitted).

neither the President *nor* Congress has the power to authorize torture; it would say nothing about the allocation of power between the two branches, which was the subject of the Bybee Memo. OPR's argument thus betrays a stunning lack of understanding of the relevant legal issue.

OPR's real complaint appears to be with the idea that interrogation methods should fall within the Commander-in-Chief power at all. But it attempts no substantive critique of the Bybee Memo's logic, supported by legal authorities on the nature of warfare, that: (1) interrogation provides military intelligence; (2) gathering military intelligence is a critical component of conducting successful military operations; (3) conducting military operations is the core purpose of the Commander-in-Chief power. As the discussion above makes clear, the Bybee Memo's logic was in full accord with the well-developed view of the Department of Justice on the breadth of the President's authority to protect national security.

In sum, the Bybee Memo's analysis of presidential power was well within the mainstream of OLC's precedents, which have long taken a muscular view of the President's Article II powers without examining, in each case, every one of the legal premises that supports this view—or the panoply of arguments that a congressional supremacist might offer in *riposte*. OPR attorneys may be new to these questions, but the fact that *they* are unfamiliar with the basic framework under which OLC operates, did not think to research basic OLC precedents, and would prefer that every OLC opinion begin with first principles is a weak basis for believing that Professor Yoo is guilty of professional misconduct.

2. Possible Defenses

OPR includes a detailed discussion of matters that it believes were missing from the Bybee Memo's analysis of *potential* defenses. This focus is curious because the Bybee Memo did not purport to provide an all-encompassing and comprehensive canvass of every conceivable matter that might be relevant to the application in practice of these defenses. As the memo clearly stated, if its statutory or constitutional analysis were ultimately proven to be mistaken, "under the current circumstances certain justification defenses *might be* available that would *potentially* eliminate criminal liability." Bybee Memo at 39 (emphases added). "Standard criminal law defenses of necessity and self-defense *could* justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens." *Id.* (emphasis added); *cf.* Rizzo Letter ¶ 5 ("The discussion of common law defenses was equivocal and [I] did not advise anyone to rely on the availability of such defenses.").

No one reading the Bybee Memo in light of these plainly stated caveats could reasonably believe that it set forth a comprehensive catalog of every permutation that might be relevant to the application of potential defenses. Even so, the memo did discuss the important factors that the lower courts have said should be considered with a necessity defense (and several of the same elements are later discussed in the memo's section on self-defense), including whether a defendant or a third party faced a threat of death or serious injury, *see* Bybee Memo at 42; whether there was a showing that the action taken by the defendant will avoid a greater harm, *see id.* at 43; and five other factors that are relevant to the necessity defense, such as whether a third alternative is available that will cause less harm, *see id.* at 40.

OPR nonetheless asserts that Professor Yoo committed professional misconduct simply by stating that some scholarly "commentators" (plural) believe that interrogations that violate Section 2340A might be justified under the doctrine of self-defense in certain circumstances. F.R. at 253–54. OPR's "smoking gun" on this point is the fact that a "*See also*" cite to an article by Professor Alan Dershowitz was added to the Yoo Memo to bolster the principal cite (from the Bybee Memo) to an article by Professor Michael S. Moore that undoubtedly supports the proposition. Based on track change edits, OPR asserts that Judge Bybee questioned the use of the plural "commentators," and that Professor Yoo added the citation to the Dershowitz article "knowing" that it did not support the proposition. F.R. at 221–22, 253–54.

OPR's principal argument is that the Dershowitz article was focused primarily on the doctrine of necessity rather than self-defense. But the Bybee and Yoo Memos lead into the relevant discussion by assuming that "[t]he threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens," and begin the paragraph in question by stating that "[t]o be sure, this situation is different from the usual self-defense justification, and, indeed, it overlaps with elements of the necessity defense." Bybee Memo at 43–44; Yoo Memo at 78–79. Moreover, Dershowitz plainly states in the cited portion of his article that he is "personally convinced that there are some circumstances—at least in theory—under which extraordinary means, including physical pressure, may properly be authorized." F.R. at 222. And Dershowitz is on record stating that the ticking time-bomb scenario is one such circumstance. *See, e.g.*, F.R. at 212 n.168 (noting Dershowitz's 2002 invocation of the ticking time bomb scenario). While OPR may quibble with the strength of the "*See also*" cite, then, the citation is neither improper nor even remotely evidence of knowing and intentional misconduct.

Aside from its qualms with Professor Yoo's Bluebooking choices, OPR also criticizes the Bybee Memo's discussion of defenses based on four principal grounds: (1) that OLC should have cited the "arguabl[e] *dictum*" of the *Oakland Cannabis* case in its discussion of the necessity defense, F.R. at 209; (2) that the Bybee Memo did not address all of the elements of the necessity defense identified by federal courts, F.R. at 210–11; (3) that OLC improperly relied on the *In re Neagle* case in its self-defense discussion, F.R. at 223–25; and (4) that OLC misinterpreted the CAT ratification history with respect to justification defenses, F.R. at 215–19. The fourth argument is addressed in the CAT Ratification History discussion above. The first three arguments are addressed below, in turn.

OPR's first criticism is that the Bybee Memo evaluated the necessity defense by looking only to *United States v. Bailey*, 444 U.S. 394 (1980), and W. LaFave & A. Scott, *Substantive Criminal Law* (1986), when it should have also examined the Supreme Court's later decision in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). It is doubtless true that the Bybee Memo would have been more complete if it had cited *Oakland Cannabis*. Citation of that case, however, would not have altered the analysis. *Oakland Cannabis* itself analyzed only two significant sources of authority on the defense of necessity: *Bailey* and the LaFave & Scott treatise, the same authorities the Bybee Memo discussed. And as the Bybee Memo explained, neither authority stands for the proposition that the necessity defense is presumptively unavailable in federal criminal cases. To the contrary, they both assume that the necessity defense is generally available unless the legislature has already balanced the values at stake. OPR did not show that the Bybee Memo misread or misapplied either source.

OPR overreads *Oakland Cannabis* to suggest that common-law defenses somehow are presumptively unavailable in federal court unless Congress expressly provides for them. The Court, however, left open *that* question. It had no need to reach it because it concluded that the statute at issue (the Controlled Substances Act) clearly *excluded* any defense of medical necessity by finding that marijuana has "no currently accepted medical use." 532 U.S. at 491 (internal quotation marks omitted). *Oakland Cannabis*, therefore, turned on the Court's conclusion that the text and structure of the statute affirmatively *precluded* the defense, and does not establish the converse proposition that OPR believes to be true, *viz.*, that a defense is not available unless it is affirmatively *included* in the statute. *Compare* F.R. at 216 ("[I]f Congress had intended to allow the necessity defense to apply to the torture statute, it could have made an explicit statement to that effect."). Following its decision in *Oakland Cannabis*, the Court has continued to address federal defenses in criminal cases on the assumption that they exist unless displaced. *See Dixon v. United States*, 548 U.S. 1, 13 & n.7 (2006). In fact, in *Dixon* the Court suggested that it will *not* readily infer that a particular statute has displaced deeply rooted common law defenses. *Id.* at 13 n.6 ("it would be unrealistic to read this concern with the proliferation of firearm-based violent crime as implicitly doing away with a defense as strongly rooted in history as the duress defense") (citing 4 W. Blackstone, Commentaries on the Laws of England 30 (1769)). OPR reluctantly concedes that *Dixon* assumes the availability of defenses, but hides that concession in a footnote. *See* F.R. at 208 n.162.

Second, OPR argues that "[a] review of . . . judicial opinions reveals that the elements of the necessity defense in federal court differ from the elements set forth in the Bybee Memo." F.R. at 210. OPR then identifies four elements that it contends "*most* courts have endorsed." *Id.* at 210–11 (emphasis added). But the Bybee Memo's discussion tracked the Supreme Court's understanding of the necessity defense:

> Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or *choice of evils*, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils.

Bailey, 444 U.S. at 409–10 (emphasis added); *cf.* Bybee Memo at 39 (referring to the necessity defense as "the 'choice of evils' defense").

Moreover, it is abundantly clear that most federal courts have *not* applied the elements that OPR has identified as constituting the necessity defense. Although OPR incorrectly states in a footnote that only "[a] *few* federal courts have adopted a 'choice of evils' analysis," F.R. at 210 n.166 (emphasis added), a review of the decisions on which OPR relies reveals that the courts of appeals have almost always applied this analysis when specifically considering the necessity defense. *See United States v. Maxwell*, 254 F.3d 21, 27 (1st Cir. 2001) ("The necessity defense requires the defendant to show that he (1) was faced with a choice of evils and chose the lesser evil, (2) acted to prevent imminent harm, (3) reasonably anticipated a direct causal relationship between his acts and the harm to be averted, and (4) had no legal alternative but to violate the law."); *United States v. Smith*, 160 F.3d 117, 123 n.3 (2d Cir. 1998) (considering Model Penal Code "'Choice of Evils'" defense); *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir. 1979) (omitting "choice of evils" discussion, but otherwise applying analysis similar to *Maxwell*); *United States v. Griffin*, 909 F.2d 1222, 1224 (8th Cir. 1990) (noting that necessity defense typical applies where defendant "acted in the interest of the general welfare" and where "the defendant's free will was properly exercised to achieve the greater good" (internal quotation marks omitted)); *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1992) ("To invoke the necessity defense . . . defendants colorably must have shown that . . . they were faced with a choice of evils and chose the lesser evil . . . ."); *United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995) ("Invocation of the necessity defense requires a showing by the defendant that . . . she was faced with a choice of evils and chose the lesser evil . . . .").[45]

And the circuits that have applied the analysis OPR espouses have uniformly done so in the more general "justification" context in firearms-possession cases, or in considering the *duress* defense, not with respect to necessity in particular. In the Sixth Circuit case on which OPR principally relies for its four elements, for example, *United States v. Singleton*, 902 F.2d 471 (6th Cir. 1990), the court considered a general "justification defense" for a felon in possession of a firearm, not the necessity defense that might apply in other contexts. *See id.* at 472. The other cases on which OPR relies are similarly limited. *See United States v. Paolello*, 951 F.2d 537, 540 (3d Cir. 1991) ("Those courts of appeals that have considered a *justification* defense to a felon in *possession of a firearm* charge have adopted a four-part test . . . ." (emphasis added)); *United States v. Gant*, 691 F.2d 1159, 1162 (5th Cir. 1982) (considering the "justification defense to a charge of violating [the felon in possession of a firearm statute]"); *United States v. Mauchlin*, 670 F.2d 746, 748 (7th Cir. 1982) (conflating duress and necessity in context of firearm possession in a federal correctional institution); *United States v. Bell*, 214 F.3d 1299, 1300 (11th Cir. 2000) (considering "a justification defense to a [felon in possession of a firearm] charge"); *United States v. Gaviria*, 116 F.3d 1498, 1531 (D.C. Cir. 1997) (considering duress defense in drug conspiracy case). OPR's contention that "most" courts apply its preferred analysis and that only a "few" courts apply the choice of evils analysis is not only misleading, it is patently incorrect. That OPR would apply this sort of one-sided analysis while purporting to condemn Professor Yoo's candor would be truly shocking were it not the *modus operandi* of the entire Report.

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[45] Other recent appellate decisions have also applied a "choice of evils" analysis similar to that discussed in the Bybee Memo. *See, e.g.*, *United States v. Perdomo-Espana*, 522 F.3d 983, 987 (9th Cir. 2008); *Raich v. Gonzalez*, 500 F.3d 850, 858 (9th Cir. 2007); *United States v. Duclos*, 214 F.3d 27, 33 (1st Cir. 2000) ("[t]he essence of the defense is that otherwise criminal conduct may be excused when the defendant commits the acts in order to avoid a greater evil").

In any event, even though the Bybee Memo structured its discussion differently than OPR would have liked by following the lead of the Supreme Court and *most* appellate courts, each of the elements OPR identified was either addressed or not discussed because the element was clearly inapplicable in context. With respect to OPR's first element, that "the defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury" (which the Supreme Court attributes to duress, not necessity, and which most federal appeals courts have not considered to be an element of the necessity defense), OPR concedes that the Bybee Memo "acknowledged this issue," but complains that it did so only "briefly." *Id.* at 211. The second element, that "the defendant did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to choose the criminal conduct," which most federal appeals courts again have not articulated as an element of the necessity defense, is clearly inapposite to CIA agents in the line of duty. The third element, that "the defendant had no reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm," is identified in the Bybee Memo, albeit in a slightly different formulation: "the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm." Bybee Memo at 40. And OPR's fourth element, that "a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm," was likewise noted, again using slightly different language: "it is for the court, and not the defendant to judge whether the harm avoided outweighed the harm done." Bybee Memo at 40. In the end, OPR's complaint is essentially that the Bybee Memo did not structure its overview of potential defenses in a way that OPR would have found more pleasing. But divining OPR's future predilections was not Professor Yoo's charge, and even if Professor Yoo had possessed the powers of clairvoyance necessary to predict those preferences it is not likely that they would have helped him much. As OPR has demonstrated in successive drafts of its report, it stands ready to make up a new set of reasons for a misconduct finding whenever the insufficiency of the old ones is pointed out. No crystal ball is *that* good. More importantly, for present purposes, no matter how many times OPR might rearrange the deck in order to rescue its predetermined conclusion, upsetting OPR's extremely questionable structural preferences is vastly insufficient to support a charge of professional misconduct.

Third, OPR contends that the Bybee Memo mischaracterized *In re Neagle*, 135 U.S. 1 (1890). F.R. at 223–25. OPR concedes, as it must, that in *Neagle* the Supreme Court expressly stated that it could "[n]ot doubt the power of the president" to defend Justice Field, but nevertheless concludes that there is "no support in *Neagle* for the proposition advanced in the Bybee Memo." *Id.* at 224. OPR also ventures that "*Neagle*'s value as a criminal law precedent is arguably limited by the unusual factual background of the case." F.R. at 224 n.183.

Here again, however, OPR's position appears to be at odds with longstanding positions of the Department of Justice, which OPR dismisses without discussion because they did not rely "solely" on *Neagle* (neither does the Bybee Memo, of course) and are not "comparable to the Bybee Memo's theory." F.R. at 224 n.183. But OPR is mistaken that the opinions are not relevant to the Bybee Memo's use of the case. For example, OLC cited *Neagle* to conclude that federal employees could provide security at the 1996 Atlanta Olympic Games, even when no federal crime had yet occurred but foreign guests might be under threat;[46] that the FBI could arrest suspects abroad, even if the apprehension would violate customary international law or treaties;[47] that the President could order the Coast Guard to intercept Haitian vessels to prevent immigrants from reaching U.S. shores;[48] and that the "President's inherent, constitutional authority as Commander-in-Chief, his broad foreign policy powers, and his duty to take care that the laws be faithfully executed generally empower him to deploy the armed forces abroad without a declaration of war by Congress or other congressional authorization."[49] It defies reason that OPR could propose professional discipline on the basis of Professor Yoo's reliance on a case that, for all that appears from the Final Report, has never been interpreted in the crabbed way that OPR proposes, especially when OPR's reading would contravene—and reverse—the Department's long-standing view of the matter.

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[46] Memorandum Opinion for the Deputy Attorney General, From: Walter Dellinger, Assistant Attorney General, *Re: Use of Federal Employees for Olympic Security*, 20 U.S. Op. Off. Legal Counsel 200 (May 17, 1996).

[47] Memorandum Opinion for the Attorney General, From: William P. Barr, Assistant Attorney General, *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 U.S. Op. O.L.C. 163 (June 21, 1989). Mr. Barr's opinion relied upon *Neagle* for the proposition that "the President's constitutional duty is not limited to the enforcement of acts of Congress or treaties according to their terms, but that it extends also to the 'rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'" *Id.* at 176 (quoting *In re Neagle*, 135 U.S. 1, 64–67 (1890)).

[48] Memorandum Opinion for the Attorney General, From: Theodore B. Olson, Assistant Attorney General, *Proposed Interdiction of Haitian Flag Vessels*, 5 U.S. Op. O.L.C. 242 (Aug. 11, 1981). According to this OLC opinion, the President's "power to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in *In re Neagle*, 135 U.S. 1, 63–67 (1890)." *Id.* at 245.

[49] Memorandum Opinion for the Attorney General, From: John M. Harmon, Assistant Attorney General, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A U.S. Op. O.L.C. 185, 185 (Feb. 12, 1980).

G. Classified Bybee Memo

OPR's criticism of the Classified Bybee Memo, which approved the use of certain specific interrogation techniques on a detainee, is even less persuasive than its critique of the Bybee Memo. OPR relies on a number of facts that could not have been known to the authors as they worked under immense time pressure, such as obscure materials on "water torture" unearthed years later by an expert on the laws of war and facts about the sleep-deprivation techniques that the CIA did not disclose. Worse still, OPR does not make clear that the Classified Bybee Memo began by stating that "this opinion is limited to these facts," and "[i]f these facts were to change, this advice would not necessarily apply," expressly disclaiming an applicability beyond the narrow context presented. Classified Bybee Memo at 1.[50]

OPR criticizes the Classified Bybee Memo on three grounds. First, OPR faults the memo because it "did not consider the United States legal history surrounding the use of water to induce the sensation of drowning and suffocation in a detainee." F.R. at 234. Second, OPR asserts that the memo failed to address the potential differences between SERE training and the CIA program concerning mental health issues. F.R. at 235–36. Third, OPR criticizes the memo for not discussing how detainees would be kept awake or made to maintain certain stress positions. F.R. at 236–37. Based on these criticisms, OPR concludes that "the legal advice provided was not thorough, objective, and candid legal advice." F.R. at 237.

OPR derives its first criticism exclusively from a single law-review article and the materials that the article discusses. *See* Evan J. Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007). The article, researched and written by a strong critic of the *policy* of waterboarding in the years after the use of the technique became public knowledge, relies heavily on obscure primary materials.[51] Although these obscure materials might have been reasonably available to Judge Wallach, a professor who specializes in the law of war and who worked without time constraints, it is completely unreasonable to argue that it was sanctionable misconduct for OLC attorneys not to have turned them up at a time when "waterboarding" was not part of the public lexicon and the subject of myriad scholarly efforts. That the OPR attorneys did not even *ask* about them in their interview of Professor Yoo—which occurred well after the public debate over waterboarding had begun, but before Judge Wallach had published his article—demonstrates quite clearly that they themselves did not locate the materials.[52]

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[50] The Classified Bybee Memo also "emphasize[d]" as its conclusion—although you would not know it from reading the Final Report—that notwithstanding OLC's "best reading of the law," the CIA "should be aware that there are no cases construing [the torture] statute, just as there have been no prosecutions brought under it." Classified Bybee Memo at 18.

[51] Although Wallach clearly believes that waterboarding is "torture" in some unspecified lay sense, he does not directly address the criminal torture statute, much less analyze its elements, and does not attempt to refute OLC's legal analysis. Rather, he says that the OLC torture definition "*may* be subject to challenge as a matter of law," and concedes that it might be "technically valid." *Id.* at 505–06 (emphasis added). The article resorts to moral and political criticisms, and conflates many aggressive interrogation techniques without ever grounding them in the criminal statute. It is not at all clear why such a discussion would be material to an analysis of the statute: Although Rule 2.1 *permits* lawyers to consider moral and political factors, there can be little doubt that such concerns were outside the scope of OLC's mandate in drafting the memos, which were directed to lawyers equally capable of weighing such obvious concerns in advising the policymakers to whom they reported. Even OPR would seem to concede this, although it characteristically buries the concession in a footnote. F.R. at 21 n.23.

In any event, Professor Yoo committed no error in failing to discuss these materials, because Wallach's (and therefore OPR's) discussion is almost entirely inapposite. The discussion is divided into three substantive parts, each of which OPR cites: (1) post-World War II prosecution of Japanese personnel for the use of "water tortures" against allied POWs during the war; (2) the use of "water tortures" in the Philippines during the U.S. occupation and later by the Ferdinand Marcos regime; and (3) a Texas criminal case in which law enforcement officers were convicted for using a "water torture" on prisoners. Prosecutions in the Japanese cases are immaterial because they involved the rigorous protections for prisoners of war under the Geneva Conventions, which are beyond the scope of the OLC memoranda and offer dramatically broader protections than the torture statute. *See, e.g.*, 1929 Geneva Convention relative to the Treatment of Prisoners of War, Part II, Art. 5 ("Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number. . . . No pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country. *Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.*" (emphasis added)).[53] The Texas case, *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), in which a "water torture" was held to violate civil rights laws when used by law-enforcement officers to extract confessions from prisoners, is similarly inapposite in light of the rigorous protections afforded suspects in police custody in the United States.[54]

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[52] Moreover, even if Professor Yoo had clearly erred in failing to locate and discuss these arcane materials, no one can seriously contend that merely making a mistake is grounds for professional discipline. It was not too long ago that the Solicitor General, the entire Supreme Court of the United States, plus their respective legal staffs, all missed the existence of a federal *statute* (which certainly is readily available through the most ordinary research effort) that was clearly relevant to the central issue in an important *capital case* then pending before the Court. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, *reh'g denied*, 129 S. Ct. 1 (2008). To our knowledge, no one has suggested that any of these lawyers should be sanctioned by the their respective bars.

[53] Moreover, these cases generally dealt with activities far removed from waterboarding as used in United States military SERE training or the Classified Bybee Memo. For example, Japanese methods apparently included the use of funnels to force water into the stomach and lungs before beating or jumping on the resulting distended stomachs to cause expulsion of the water. Wallach at 492. Versions of the practice also included the use of kerosene and human waste. *Id.* at 493 n.109. And most cases included severe beatings up to and including death.

[54] That this or other cases Wallach cites use the term "torture" colloquially is not informative, as the term can be applied to all manner of behavior, including cruel, inhuman, or degrading

The Philippines cases are potentially relevant, but the Appendix to the Bybee Memo clearly addressed the *Marcos* litigation to which Wallach and OPR refer. *See* Bybee Memo at 49 (discussing *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996), for pattern of torture where, among other activities, "guards placed a towel over [the victim's] nose and mouth and then poured water down his nostrils"). The Bybee Memo addresses an appellate decision, not the trial court decision to which Wallach and OPR refer, but the trial court decision does not note the distinction between torture and cruel, inhuman, and degrading treatment as the appellate decision does, rather referring without analysis to both "torture" and "human rights abuses." *See In re Estate of E. Marcos Human Rights Litig.*, 910 F. Supp. 1460 (D. Haw. 1995). The remainder of Wallach's discussion, concerning the use of the "water cure" by U.S. forces during the occupation of the Philippines, is for the most part a survey of debate over the propriety of its use as a matter of policy. *See, e.g.*, Wallach at 498 (letter from an anonymous Army captain to the New York Times noting that "[t]he water cure is very uncomfortable, but not serious" and that it was restricted to use on "outlaws," not combatants). There was one court martial related to the use of the "water cure," however, in which one defendant was acquitted and the other convicted and suspended from command for one month and fined $50. *See* Wallach at 500 n.144; F.R. at 234 n.193. The court martial was for "conduct to the prejudice of good order and military discipline" for violation of a military general order that proscribed "torture with a view to extort a confession" without defining the term. *Id.* According to the account of the court martial on which Wallach and OPR rely, in contrast to waterboarding, "the 'water cure' . . . consisted in forcing large quantities of water (sometimes salted water) into the mouth and nose of a victim as a result of which his or her stomach would inflate causing great pain and, eventually, suffocation." Guénaël Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899–1902)*, 1 J. Int'l Crim. Justice 135, 143 (2003). This single court martial is beyond obscure, its facts are different, it is not an interpretation of the statute at issue, and as such it is neither precedential nor persuasive. The fact that an adjunct professor of the law of war was able to dig it up while researching an after-the-fact academic article can hardly be used to condemn the OLC authors for not having found and discussed it.

In sum, OPR's contention that the failure to discuss these inapposite and utterly obscure materials amounts to sanctionable incompetence cannot withstand scrutiny. As OPR concedes, "[n]one of these cases involved the interpretation of the specific elements of the torture statute. Nor are there sufficient descriptions in the opinions to determine how similar the techniques were to those proposed by the CIA." F.R. at 235. As with so many other parts of its report, this whole discussion appears primarily intended to add heft and a most superficial patina of academic rigor to OPR's handiwork, presumably in the hope that incautious readers will mistake prolixity for profundity, and sheer length for solid legal analysis. There is absolutely no basis for professional sanction in these circumstances.

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treatment not amounting to torture under the rigorous requirements of the criminal statute. *Cf.* Levin Memo at 4 (distinguishing "certain colloquial uses of the term ['torture']" from the statutory definition) (citing *Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004)).

OPR also criticizes the Classified Bybee Memo for not adequately addressing the differences between the effect of the waterboard in SERE training and in actual detainee captivity. F.R. at 235–36. To this end, OPR falsely claims that "the Classified Bybee Memo relied almost exclusively on the fact that the 'proposed interrogation methods have been used and continue to be used in SERE training' without 'any long-term mental health consequences.'" *Id.* at 235. But the data demonstrating that no SERE trainees had ever suffered prolonged mental harm is clearly highly relevant, and the fact that detainees are in a different posture from trainees is quite obvious. It is for this reason that the Classified Bybee Memo devoted several pages to the CIA's *individualized* psychological assessment of the high value detainee subject to interrogation: "[I]n consulting with a number of mental health experts, you have learned that the effect of any of these procedures will be dependent on the individual's personal history, cultural history and psychological tendencies. To that end, you have informed us that you have completed a psychological assessment of Zubaydah. . . . According to your reports, Zubaydah does not have any pre-existing mental conditions or problems that would make him likely to suffer prolonged mental harm from your proposed interrogation methods." Classified Bybee Memo at 6–8. This section also noted, for example, that "it is believed that Zubaydah wrote al Qaeda's manual on resistance techniques" and that he would "draw upon his vast knowledge . . . to cope with the interrogation," that "he has a 'reliable and durable support system' in his faith," and that he demonstrates "emotional resilience." *Id.* at 7–8. The Classified Bybee Memo clearly recognized the necessity of the individualized psychological assessments that were an important component of the CIA program, and did not rely merely on the SERE data as OPR suggests.

Finally, OPR argues that "OLC attorneys limited their analysis to the physical effects of lack of sleep, without inquiring about or considering how the subject would be kept awake," and "did not consider whether subjects would be shackled, threatened, or beaten by the interrogators, to ensure that they maintained those positions." F.R. at 236–37. But this information was unknown to OLC at the time, and the Classified Bybee Memo's analysis was "based upon" and expressly "limited to" the facts provided by the CIA. Classified Bybee Memo at 1 (also noting that "[i]f these facts were to change, this advice would not necessarily apply"). In any event, these techniques were validated by the Bradbury memoranda (with a more detailed knowledge of the methods used). *See* F.R. at 135 *et seq*. And even if OPR believes that the Classified Bybee Memo's analysis is not as good as the Bradbury memoranda's later analysis, there is absolutely no basis for OPR to assert that this difference amounts to sanctionable misconduct.

In support of its argument, OPR also cites a Supreme Court case (apparently) for the proposition that sleep deprivation amounts to torture. The case, *Aschraft v. Tennessee*, 322 U.S. 143 (1944), involved a murder suspect who was interrogated for thirty-six hours without sleep before he ultimately confessed to the crime. The majority opinion, finding the confession to have been coerced and overturning the subsequent conviction as a violation of due process, cited in a footnote an ABA report stating that "[i]t has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." *Id.* at 150 n.6. Justice Jackson authored a strong dissent from the majority opinion, however, joined by Justices Roberts and Frankfurter, suggesting that sleep deprivation was not a clear-cut deprivation of the substantial rights afforded suspects in custody in the United States. In any event, no one could reasonably contend that the Court's colloquial use of the word "torture" in this context remotely bears on the elements of "torture" as defined by a particular criminal statute that was enacted fifty years later. And OPR makes no effort to show how this case would have informed the Classified Bybee Memo.[55]

H. Yoo Letter

OPR takes issue with two aspects of the August 1, 2002 letter from Professor Yoo to White House Counsel Alberto Gonzalez that accompanied the Bybee Memo (the so-called "Yoo Letter"): (1) that the letter "blurred some important distinctions" concerning treaty "reservations" and treaty "understandings," F.R. at 238–39; and (2) that the letter inadequately analyzed the possibility of prosecution under the Rome Statute in the International Criminal Court. F.R. at 239–40.

With respect to the first criticism, OPR flatly mischaracterizes what the Bybee Memo said. According to OPR, "Yoo did not elaborate on the well-established meanings of 'reservation' and 'understanding' in U.S. and international law" and so incorrectly assumed that the nominal "understanding" that the United States submitted with the CAT (defining torture in similar terms as the torture statute) would be treated as a binding "reservation" by other nations. F.R. at 239.

The Yoo Letter did not conflate reservations and understandings. To the contrary, it recognized the critical legal principle—also emphasized by the sources OPR cites but ignored by OPR itself—that whether a condition is a reservation or an understanding depends not on what the condition is *called*, but rather on its *content*. If the condition modifies a U.S. obligation under the treaty, it is a reservation, even if the Senate calls it an "understanding." *See* Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, 98th Cong., 2d Sess. 125–26 (Comm. Print prepared for the Senate Comm. On Foreign Relations, 1984) ("CRS Report") ("What may seem to the Senate to be a reasonable interpretation, and therefore an understanding, might appear to the other country or countries involved to be an important modification, and therefore a reservation . . . ."); *id.* at 154 ("However, whether in fact a particular statement is a reservation or merely a non-substantive addition to an agreement is determined by its content and not by its title."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 313 cmt. g (1987) ("When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation.").

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[55] It bears mentioning that OPR omits from its ostensibly "objective" analysis of the Classified Bybee Memo any mention of what the memo [redacted] *cf.* Rizzo Letter ¶ 2 (OLC "did not simply 'rubber stamp' everything the CIA was considering."). This sort of irresponsible innuendo not only reflects poorly on OPR, but is consistent with the pervasive bias of the Final Report. An objective analysis would have credited the difficult line-drawing task with which OLC was charged, and recognized that the approval of the waterboard but not [redacted] reflected a good-faith, if debatable, drawing of an extremely difficult statutory line with important national-security implications.

The argument of the Yoo Letter was that *if* the U.S. "understanding" set out a higher intent standard than the CAT, *then* it was a reservation and therefore exempts the U.S. from the CAT's lower intent standard—an argument that fully accords with basic principles of international law. The Yoo Letter first stated that the United States attached to its instrument of ratification a condition entitled an "understanding." Yoo Letter at 3–4. It then explained that, in the author's view, that title was correct because, according to what he considered the better reading of the CAT, the submission did not modify the intent standard but rather clarified it. Letter at 4 n.6. The Yoo Letter also then pointed out, however, that the "understanding" would be considered a "reservation" under international law "*if* it indeed modifies the Torture Convention standard." Letter at 4 n.5 (emphasis added). That is simply a straightforward application of the international-law principles described above: If the "understanding" changed the U.S.'s obligation under the treaty, it was in substance a reservation.

Not only does OPR fail to address (much less critique) this central point, but it appears not even to understand it. In footnote 197, OPR strangely faults the Bybee Memo for explaining that if the standard in the CAT is *equivalent* to the standard in the torture statute, then the "understanding" really is an understanding. F.R. at 238 n.197. That follows directly from the principles set out above, and OPR's confusion about it is baffling.

OPR's second criticism has two parts: (a) the Yoo Letter did not consider article 8(2)(b)(xxi) of the Rome Statute, which OPR asserts criminalizes "humiliating and degrading treatment"; and (b) the Yoo Letter erroneously assumed that a foreign court would accept the President's determination that members of al Qaeda and the Taliban are not protected under the Geneva Conventions. F.R. at 239–40.

First, OPR does not contest the Yoo Letter's determination that the two provisions of the Rome Statute that include a prohibition on "torture"—Articles 7 and 8(2)(a)(ii)—did not apply to al Qaeda and Taliban detainees. But OPR accuses the Yoo Letter of ignoring Article 8(2)(b)(xii), which classifies as "war crimes" any "serious violations of the laws and customs applicable in international armed conflict, *within the established framework of international law*, any of the following acts: . . . [c]omitting outrages upon personal dignity, in particular humiliating and degrading treatment." Rome Statute art. 8(2)(b)(xxi) (emphasis added). Yet OPR has identified no enforceable legal obligation "within the established framework of international law" prohibiting "humiliating and degrading treatment" of unlawful enemy combatants not covered by the Geneva Conventions, and this precise language is in fact drawn from the Conventions themselves. *See* Bybee Memo at 15 n.8; F.R. at 153, 159. The Yoo Letter did not address Article 8(2)(b)(xxi) in light of the letter's conclusion that the detainees were excluded from protections of the Geneva Conventions, the "established framework of international law" at issue.

Second, OPR's criticism that a foreign court would not accept the President's "determination" that the Geneva Conventions do not apply to the detainees misleadingly suggests that the President's legal judgment was some sort of discretionary decision. The President's determination was based not on a willy-nilly subjective assessment, but on the then-prevailing interpretation of the Geneva Conventions within the Executive Branch—an interpretation that OPR does not challenge as a product of professional misconduct and that three Supreme Court Justices voted to uphold, *see Hamdan v. Rumsfeld*, 548 U.S. 557, 718–19 (2006) (Thomas, J., dissenting, joined by Scalia, J.); *see also Hamdan v. Rumsfeld*, 415 F.3d 33, 40–42 (D.C. Cir. 2005) (per Randolph J., joined by Roberts, J.). OPR appears to be suggesting that the Yoo Letter should have analyzed the Rome Statute under what OLC at the time viewed as an *incorrect* interpretation of the Geneva Conventions, an unheard-of standard for finding professional conduct. Not only is it impossible to see how the omission of such a thought experiment could amount to a disciplinary violation, but the Yoo Letter actually *did do just that*, when it warned that "[i]t is possible that an ICC official would . . . disagree with the President's interpretation of the [Geneva Convention]." Yoo Letter at 6.

VII. OPR's After-The-Fact Scienter Findings Are Unsupportable.

In a stunning if characteristic display of incompetence, OPR failed in its Draft Report to determine at all whether Professor Yoo and Judge Bybee had acted with the level of scienter required under OPR's *own framework*. That is, in its rush to publicly castigate the authors of the memos, OPR did not even conduct the critical inquiry required in *every case*.

OPR's Policies and Procedures, as we pointed out in our comments, state that:

> At the conclusion of the investigation, OPR makes findings of fact and reaches conclusions as to whether professional misconduct has occurred. OPR may find professional misconduct in two types of circumstances: (1) where an attorney *intentionally* violated an obligation or standard imposed by law, applicable rule of professional misconduct, or Department regulation or policy, or (2) where an attorney acted in *reckless disregard* of his or her obligation to comply with that obligation or standard. OPR may also find that the attorney used poor judgment or made a mistake; such findings do not constitute findings of professional misconduct.

OPR Policies and Procedures ¶ 9 (emphasis in original). "The elements essential to a conclusion that an attorney committed professional misconduct, then, are that the attorney (1) violated or disregarded an applicable obligation or standard (2) with the requisite scienter." OPR Analytical Framework ¶ B(1). *See also* OPR 2005 Annual Report at 7–8 n.3–6 (articulating standards). It is worth recalling, yet again, that in December of last year OPR was prepared to *publish* this report.

Having now been alerted to the text of its own framework, OPR has slapped onto the end of its Final Report a six-page postscript that concludes that Professor Yoo violated a "clear and unambiguous obligation purposefully or knowingly" and that Judge Bybee acted in reckless disregard of such an obligation. F.R. at 251–57. (Recall that this "clear and unambiguous obligation" arises out of the "Best Practices Memo" and "Principles Memo" authored years after Yoo left OPR.)

OPR cannot possibly be correct that Professor Yoo *intentionally* violated the rules of professional conduct. Even if one disagrees with the analysis of the Bybee Memo presented above and ultimately concludes that Professor Yoo incorrectly analyzed some of the legal issues, there was at least a good-faith basis for his views. At most, OPR has demonstrated that there could be disagreement about difficult legal issues analyzed in the memos. Indeed, OPR leads off its scienter analysis by stating that the "Bybee Memo had the effect of authorizing a program of CIA interrogation that *many would argue* violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture." F.R. at 251–52 (emphasis added). Tucked inside the ambiguous "many would argue" is the fact that the "many" are certain academics and commentators, and those opposed to their critiques are Yoo's successors at OLC and numerous federal judges. And also excluded from the "many," of course, is OPR itself, which declines to determine whether Professor Yoo's bottom-line advice that the enhanced-interrogation techniques were not torture was correct.

OPR's specific scienter "findings" run the gamut from picayune to unsupportable to outright illogical. None supports the inference that Professor Yoo intentionally violated disciplinary rules or in any way acted in bad faith.

A. Incomplete Analysis Of The Commander-in-Chief Power.

OPR's first ground for concluding that Yoo intentionally violated rules of professional conduct is that "Yoo knowingly provided incomplete and one-sided advice in his analysis of the Constitution's Commander-in-Chief clause." F.R. at 252. As discussed earlier in this response, OPR's analysis on this point betrays a massive ignorance of OLC practice and precedent, faulting Yoo for failing to cite things like *Youngstown* and the Take Care clause that OLC memos *rarely* cite in similar circumstances because reiterating their basic relevance adds nothing to a discussion of the issue at hand.

Perhaps realizing how unsupportable it would be to base a scienter finding on its uninformed critique of the merits of Professor Yoo's analysis—and how doing so would logically require the censure of most OLC attorneys, including those, like Walter Dellinger, who signed the Principles Memo—OPR instead cites four tangential factors as a basis for its claim that Professor Yoo intentionally provided incomplete advice. None has merit.

First, OPR points to Patrick Philbin's comment that the section was "aggressive" and "a step beyond" OLC's prior opinions. F.R. at 252. Contrary to OPR's suggestion, however, Philbin did not believe that the section was *incorrect*, instead considering it unnecessary *dicta* that could be omitted because the approved techniques were lawful. (Of course, the section *was* necessary because, as Addington testified, the client had requested it.) Had Philbin believed that the analysis was wrong, he would not have advised Judge Bybee to sign the memo. F.R. at 63. As the "second Deputy" assigned to ensure the accuracy of the memo, Philbin could not have ethically given his approval had he thought that the section misstated the law. Indeed, if he had, he would have been committing an "intentional" violation of the rules of professional conduct, a conclusion that OPR expressly disavows. F.R. at 257–58.

Second, OPR places great weight on the view of certain academics that the Commander-in-Chief power is more limited. F.R. at 252. But the fact that some *law professors* take a limited view of executive power should come as a shock to no one. What OPR omits from its discussion is that *OLC* has historically taken a *robust* view of executive power. *See, e.g.*, Flanigan Decl. ¶ 6 ("OLC's opinions interpreting the President's powers under the Constitution and relevant statutes have tended to reflect a robust view of those powers."). And a review of OLC opinions from past presidential administrations reveals that OLC attorneys have never viewed the duty of candor to require them to discuss and refute law-review articles espousing contrarian views of executive power from left-of-center academics (many of whom subscribe to very different methods of constitutional interpretation than OLC) each time they consider the issue. That Yoo followed OLC's past practices in this regard cannot be evidence of an "intentional" violation of the rules of professional conduct.

Third, OPR claims that the section did not explicitly state that a presidential order was required to invoke the Commander-in-Chief power.[56] F.R. at 252. But that is simply a misreading of the opinion by lawyers alien to OLC practice and precedent; the memo signaled this understanding clearly enough for the sophisticated audience to which this discussion was addressed. The memo noted, for example, that "section 2340A[] as applied to interrogations of enemy combatants *ordered by the President pursuant to his Commander-in-Chief power* would be unconstitutional." Bybee Memo at 39 (emphasis added); *see also id.* at 36 ("Congress cannot compel the President to prosecute outcomes taken pursuant to the *President's own constitutional authority*.") (emphasis added); *id.* at 38 ("The *President's complete discretion* in exercising the Commander-in-Chief authority has been recognized by the courts.") (emphasis added). The requirement that the President himself personally invoke the Commander-in-Chief power, moreover, would be quite familiar to the White House Counsel, since it comports with well-established precedent in related contexts. *See, e.g.*, *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 935 (D.C. Cir. 1982) ("Only the President, not the agency, may assert the presidential privilege . . . .") (citing *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 447–49 (1977)).

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[56] OPR does not appear to dispute that it is common to interpret federal statutes, even those entirely directed to challenging governmental decisionmaking, not to necessarily apply to decisions taken by the President *personally*. Indeed, the Bybee Memo cited (but OPR does not address) *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992), for this proposition. Bybee Memo at 34. *Franklin* reached precisely such a conclusion in the context of the Administrative Procedure Act "[o]ut of respect for the separation of powers and the unique constitutional position of the President." 505 U.S. at 800.

In addition, Professor Yoo told OPR that OLC lawyers "would have made it clear" that the Commander-in-Chief power had to be invoked by the President personally, and that "because [CIA officers] get Presidential approval for every covert action they undertake, precisely for this reason," it would have been clear to them that a Commander-in-Chief defense had to be "traceable to [a] direct Presidential order." June 7, 2005 Yoo Tr. at 66–68. In fact, John Rizzo has made clear that he "interpreted the Commander-in-Chief section to refer to interrogations personally ordered by the President." Rizzo Letter ¶ 5. OPR gives no evidence that Professor Yoo's or John Rizzo's recollections are mistaken, and, perhaps most importantly, OPR points to *absolutely no evidence whatsoever* suggesting that the CIA or anyone else thought that they could engage in acts of torture under their own invocation of the Commander-in-Chief power. If any such evidence existed, there can be no doubt that OPR would have emphasized it. In fact, OPR has no counter to the evidence that does exist—that Professor Yoo conveyed this information orally to the CIA. F.R. at 206. And we will apparently never know the extent to which OPR's interviews and materials uncovered in their investigation otherwise demonstrate that everyone involved understood that they could not unilaterally invoke the Commander-in-Chief power, because OPR has steadfastly refused to provide Professor Yoo with any access to those materials.

Fourth, OPR infers that because the Commander-in-Chief analysis was added after Michael Chertoff opted not to provide the CIA with advance declination of criminal prosecution, it must have been intended to immunize CIA agents from prosecution for acts of torture. F.R. at 252. OPR does not even attempt, however, to reconcile this assertion with the fact that Chertoff reviewed the memo's Commander-in-Chief analysis without objection, and there is no evidence that the CIA interpreted the Bybee Memo to provide immunity for its interrogators. *See* F.R. at 59.

These factors simply do not show intentional misconduct. Professor Yoo offered a good-faith, objective assessment of the Commander-in-Chief power well within the mainstream of OLC opinions.

B. The Failure To Convey Sufficient "Uncertainty Or Ambiguity" About The Meaning Of Specific Intent

OPR's second ground for finding that Professor Yoo intentionally violated the duty of candor is that the memos' "advice on the issue of specific intent did not convey any of the uncertainty or ambiguity of this area of the law." F.R. at 252–53. But as discussed above, OPR is flat-out wrong that this area of the law was so confused that it amounted to professional misconduct not to highlight the ambiguity. When courts subsequently considered the issue of specific intent as applied to torture, *none* noted that the meaning of "specific intent" is fraught with "uncertainty or ambiguity." That is because it is not. OPR's only support for its proposition is decades-old Supreme Court cases noting some degree of uncertainty about the difference between "general intent" and 'specific intent." But in 2000, the Supreme Court expressly made "the distinction between 'general' and 'specific' intent less esoteric" in *Carter v. United States*, 530 U.S. 255, 268–69 (2000), and Professor Yoo acted appropriately in relying on that recent, clear statement rather than *dicta* in much older cases. Even if one believes that Professor

Yoo would have been better advised to cite those older cases too, that omission could not possibly be evidence of *intentional* misconduct.

Moreover, OPR is incorrect that Professor Yoo's accurate statement of the meaning of "specific intent" intentionally "suggested that an interrogator who inflicted severe pain and suffering during an interrogation would not violate the torture statute if his objective was to obtain information," F.R. at 252. The Bybee Memo no more suggested that than did the *en banc* Third Circuit when it adopted virtually the same definition in *Pierre v. Attorney General*, 528 F.3d 180, 188–90 (3d Cir. 2008). Indeed, OPR has not come forward with evidence that *anyone* at the CIA, the Justice Department or the White House interpreted the memos that way. *Cf.* Rizzo Letter ¶ 5 ("[I] did not interpret the 2002 Bybee Memos to mean that . . . CIA interrogators would not violate the statute no matter what they did as long as they had a motive to obtain information.").

C. The Failure To Mention The Withdrawal Of The Reagan Administration's Proposed Understandings In The CAT Ratification History

OPR's third ground for finding scienter is that Yoo did not mention the withdrawal of the Reagan Administration's proposed understandings of the CAT concerning defenses. F.R. at 253. According to OPR, mentioning that withdrawal would have "contradict[ed] the memorandum's assertion that self-defense could be invoked by CIA interrogators charged with torturing detainees." *Id.*

The Bush Administration gave as its explanation for removing the understanding only that it was "felt to be no longer necessary," not that the defenses were foreclosed. S. Exec. R. 101-30, at 14. Given that Congress specifically declined to domesticate the provision of CAT foreclosing defenses of justification, *see* Bybee Memo at 41 n.23, Professor Yoo acted reasonably in believing that the withdrawal of the understanding as "no longer necessary" did not materially alter his analysis. To be sure, the Bybee Memo could have been improved by citing the Mullin Letter, but OPR's evidence shows that [redacted] did not alert Professor Yoo to it. F.R. at 218. The omission of relevant but ultimately non-dispositive evidence that Professor Yoo *did not know about* could not possibly show *intentional* misconduct.

D. The Use Of "*See Also*" In The Discussion Of Common-Law Defenses

OPR's final ground for finding scienter is that Yoo added to the Yoo Memo a "*See also*" cite an article by Professor Alan Dershowitz, in addition to the primary cite used in the Bybee Memo, to support the statement that "some leading scholarly commentators" have agreed that the doctrine of self-defense might apply in certain situations, even though, in OPR's view, the article does not directly support the proposition. R at 254.

As a basis for a finding of *intentional* misconduct, this is madness. Lawyers routinely bolster a contested proposition with a "*see also*" cite that their legal (or, in this case, political) opponents might disagree with. OPR has not cited a single case where a lawyer has been professionally sanctioned for this common practice. Moreover, as we have already explained, Professor Yoo had a sound basis for citing the Dershowitz article, particularly with the "*See also*" signal that many treat as weaker than its cousin "*See*." The relevant section opened by positing that "[t]he threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens," and then further stated that "[t]o be sure, this situation is different from the usual self-defense justification, and, indeed, it *overlaps with elements of the necessity defense*." Bybee Memo at 43–44 (emphasis added); Yoo Memo at 78–79 (same). The cited portion of the Dershowitz article states that he is "personally convinced that there are some circumstances—at least in theory—under which extraordinary means, including physical pressure, may properly be authorized." F.R. at 222. And Dershowitz has stated elsewhere that the ticking time-bomb scenario is one such circumstance. *See, e.g.*, F.R. at 212 n.168. It was plainly a rational inference to draw—particularly for an academic like Professor Yoo who was familiar with Dershowitz's views—that Dershowitz would think that a government official could invoke the doctrine of self-defense in a ticking time-bomb situation. Might it have been better practice for Professor Yoo to have used a "*cf.*" signal? Perhaps. But such an indescribably minor error could not remotely amount to evidence of an intentional lack of candor.

* * *

Succinctly put, nothing OPR has cited shows that Professor Yoo offered anything less than a good-faith assessment in the Bybee Memo. In fact, Goldsmith, on whom OPR so heavily relies, said in his book *The Terror Presidency* that "[Yoo] has defended every element of the opinion to this day, and I believe he has done so in good faith." J. GOLDSMITH, THE TERROR PRESIDENCY 167 (2007). OPR conveniently relegated that view of a key insider and expert—which flatly contradicts OPR's overall assessment that Yoo intentionally acted without candor—to the briefest of footnotes. F.R. at 197 n.151.

VIII. Conclusion

OPR dangerously contorts the rules of professional conduct, rendering them more malleable and unpredictable with each iteration of its Report. No aspect of the interrogation advice that OLC gave the President in the tense aftermath of 9/11 is too miniscule to escape OPR's tendentious characterization, detailed dissection and reflexive condemnation—and there is literally no argument, however desperately strained, that OPR is unwilling to advance in pursuit of this goal. At the same time, OPR has repeatedly ignored or misrepresented the applicable law, cherry-picked the factual record, and failed utterly to offer any rationale for believing that its proposed referral to the Pennsylvania bar is not obviously time-barred as a result of OPR's own lack of diligence and competence. The Final Report is irretrievably flawed, not merely under the *sui generis* "highest of the highest" standard that OPR has concocted solely for this investigation, but under conventional and generally applicability standards of professional responsibility that are well known to the legal profession.

This perversion of the professional rules, and myopic pursuit of Professor Yoo and Judge Bybee, can be explained only by a desire to settle a score over Bush administration policies in the war on terror. But policy disputes are for the ballot box, not for the bar. Professor Yoo and Judge Bybee did nothing more than provide a good-faith assessment of the legality of a program deemed vital to our national security. Their assessment was validated at the highest levels of the Department of Justice and the Executive Branch, and the bottom-line advice was repeatedly reaffirmed long after Professor Yoo and Judge Bybee had left the Department. Even OPR expressly disavows *any* finding that the conclusions they reached were erroneous. This is not the stuff of professional misconduct, as OPR's failure to marshal a single supporting authority amply demonstrates.

The Department must make an enormously consequential decision from which there can be no turning back, because any decision by the Department to adopt or publicize the Final Report's recommendations will have unfortunate and long-lived consequences. If the Department does adopt or publicize the Report, it will place itself squarely on a path of politicization and acrimony. The cable news networks will have their sound-bites, of course, and a handful of politicians will score every political point that their grandstanding will permit. But after they quickly move on to the next target of opportunity, the Department will be left to deal with the consequences. It would be utterly naïve to suppose that OPR investigations and bar complaints will not become the newest weapon of choice in the arsenal of political warfare—which, like "Borking," will be invoked by successive groups of partisans, as electoral fortunes turn, for no better reason than that "the other side did it to us." The Department's dedicated attorneys will then have to perform their enormously difficult duties under the ever-present danger that good-faith legal conclusions will come to haunt them with the shifting political winds. The result will be a diminished culture in which self-preservation is paramount and unvarnished advice is scarce. No responsible official who cares for the institutional interests of the Department can possibly contemplate such a path with equanimity.

The Department should reject OPR's extremely misguided and erroneous conclusions.

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October 7, 2009

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Dear Mr. Estrada,

You asked for my opinion concerning allegations that Professor John Yoo engaged in professional misconduct in certain work he performed while serving as Deputy Assistant Attorney General at the Department of Justice's Office of Legal Counsel (OLC).[1] To that end, in March of this year, I reviewed an unclassified draft report prepared by the Department's Office of Professional Responsibility (OPR). That report accused Professor Yoo of violating D.C. Rules of Professional Conduct 1.1 and 2.1. I also reviewed the "Bybee Memo" discussed in that report.

Since my original review, the Department has made public a second memo (formerly classified) issued by OLC on the same day as the Bybee Memo. I will refer to this second memorandum as the "Classified Bybee Memo." The Classified Bybee Memo assessed the validity of specific interrogation techniques under the legal standards set forth in the Bybee Memo. This more recently declassified Memo relied heavily on the expert factual advice that the CIA gave to the Department of Justice. This legal opinion was fact-bound. The CIA, relying on medical and psychological experts, assured the DOJ that the waterboard "procedure does not inflict actual physical harm." The CIA represented to the DOJ that "these acts will not be used with substantial repetition, so that there is no possibility that severe physical pain could arise from such repetition." The CIA similarly assured the DOJ that the use of the waterboard, with the safeguards that the CIA said it would use, would cause no prolonged mental harm. This more recently declassified Bybee memo obviously relied on the facts that the CIA related to the DOJ. You have asked me to summarize my original conclusions about the Bybee Memo and OPR's draft report, and to set forth my views on whether the Classified Bybee Memo conforms to D.C. Rules 1.1 and 2.1. My basic conclusions are as follows:

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[1] By way of credentials: I am the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at the Chapman University School of Law. I have co-authored the most widely used course book on legal ethics, *Problems and Materials on Professional Responsibility* (Foundation Press, 10th ed. 2008). I am also the co-author of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-West Group, St. Paul, Minnesota, 7th ed., 2009) and the six-volume *Treatise on Constitutional Law* (Thomson West Publishing Co., 4th ed. 2007-2008). I have chaired the subcommittee that drafted the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement. In addition, I have been a member of the Publications Board of the A.B.A. Center for Professional Responsibility since 1994. I have also served on the A.B.A. Standing Committee on Professional Discipline (1991–1997), and I was Liaison to the A.B.A. Standing Committee on Ethics and Professional Responsibility (1994–1997).

- The D.C. Rules of Professional Conduct did not govern Professor Yoo while he was employed at OLC. Those Rules do not govern lawyers who are not members of the D.C. Bar and who do not practice before a court in Washington, D.C. Anyone who read the Rules would know that the D.C. Bar made a specific decision not to assert jurisdiction over a lawyer who is not admitted in the District of Columbia but who engages in the practice of law within the District. Because Professor Yoo is only a member of the Pennsylvania Bar and did not practice before a D.C. court while employed at OLC, the D.C. rules do not govern his conduct.

- The Pennsylvania Bar has established a four-year statute of limitations for disciplinary complaints against an attorney. *See* Pennsylvania Disciplinary Board Rules § 85.10(a) (2009) ("The Office of Disciplinary Counsel or the Board shall not entertain any complaint arising out of acts or omissions occurring more than four years prior to the date of the complaint, except as provided in subsection (b)."). Given that the relevant OLC memoranda were issued more than four years ago, and none of the exceptions listed in subsection (b) of the Pennsylvania Rule apply, it is obvious that the Pennsylvania Bar does not have jurisdiction to pursue disciplinary action against Professor Yoo. It is not ethically appropriate for Department attorneys to make a referral to bar authorities—which is essentially equivalent to submitting a complaint to them—unless the attorneys have at least a colorable basis for believing that the referral is timely. It is ordinarily considered incompetent and sanctionable for a lawyer to file a complaint that he or she knows is time-barred, without any legal or factual basis for believing that the court or adjudicative body will excuse the violation of the statute of limitations.

- During Professor Yoo's tenure at OLC, Rule 2.1 of the Pennsylvania Rules of Professional Conduct varied from the A.B.A. Model Rules in that it used the permissive word "should" rather than the mandatory word "shall": "In representing a client, a lawyer *should* exercise independent professional judgment and render candid advice." Pennsylvania Rule of Professional Conduct 2.1 (2003) (emphasis added). A basic tenet of the law of professional responsibility is that Rules phrased permissibly are not enforceable through the disciplinary process. *See* Pennsylvania Rules of Professional Conduct, "Scope." Therefore, Professor Yoo was not subject to discipline under Pennsylvania Rule 2.1.

- Even if the D.C. Rules were applicable (and, by their own terms, they are not), neither the Bybee Memo nor the Classified Bybee Memo would violate D.C.'s mandatory Rule 2.1. Under that Rule, a lawyer cannot be guilty of rendering non-candid advice so long as he gives his "honest assessment." *See* D.C. Rule of Professional Conduct 2.1 Comment 1 (2009) ("A client is entitled to straightforward advice expressing the lawyer's honest assessment."). Rather, pursuant to Rule 1.4(b), the lawyer has an obligation to "explain a matter to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation." D.C. Rule of Professional Conduct 1.4(b) (emphasis added). A lawyer has no general obligation to discuss all potential counterarguments to his good-faith conclusions or to remind a client of information of which the client is already aware. Based on my review of the Bybee Memo and the Classified Bybee Memo, there is no basis whatsoever to conclude that Professor Yoo did not explain the issues "to the extent reasonably necessary" to allow his client to make an informed decision. The Bybee Memo examined the text of the torture statute, its legislative history, and the relevant case law, and concluded that minor psychological or physical harm is not torture, while severe harm (whether mental or physical) is torture. It further advised that, if one were charged with torture, one might have some defenses that might work, or might not work. A reasonable reader of the Bybee Memo would not conclude that it was authorizing interrogators to violate the torture statute. The Classified Bybee Memo relied on the expert medical advice and the outside psychologists that the CIA consulted, and concluded "*based on the facts that you [the CIA] have provided*, . . . that the interrogation procedures that you propose would not violate Section 2340A." That Memorandum then concluded, in clearly tentative language, "We wish to emphasize that *this is our best reading of the law*; however, you should be aware that *there are no cases construing this statute*; just as there have been no prosecutions brought under it."

- Obviously, a lawyer must be competent. D.C. Rule 1.1 requires a lawyer to "provide competent representation to a client." D.C. Rule of Professional Conduct 1.1(a). Under D.C. law, a violation of Rule 1.1 must include a "serious deficiency" in the representation, which "has generally been found in cases where the attorney makes an *error that prejudices or could have prejudiced a client* and the error was caused by a lack of competence." *In re Evans*, 902 A.2d 56, 69–70 (D.C. 2006) (emphasis added). In my review of the Bybee Memo, the Classified Bybee Memo and OPR's draft report, I saw no evidence that Professor Yoo acted incompetently. He accurately described the reported cases dealing with torture under the statute. His analysis of "severe pain" is no more strict than was adopted by the D.C. Circuit in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). Professor Yoo's bottom-line advice about the relevance of specific intent was adopted by the Third Circuit in 2005, and 2008. *See Auguste v. Ridge*, 395 F.3d 123, 139, 153-54 (3d Cir. 2005); *Pierre v. Attorney General*, 528 F.3d 180, 189 (3d Cir. 2008) (en banc) (in fact, the three concurring judges specifically objected that the 10-judge majority was adopting the Bybee Memo, but that fact did not dissuade the majority, *id.* at 193). Indeed, the Department of Justice, under Attorney General Eric Holder, specifically advocated the Bybee Memo position on intent in its brief in *Demjanjuk v. Holder*, 6th Circuit, April 23, 2009, Respondent's Submission In Response To Court's April 16, 2009 Order Agency No. A008 237 417, at p. 20, Case Number: 09-3416. The views of the D.C. and Third Circuits, and the view of the DOJ itself in 2009, are both highly relevant in assessing whether Professor Yoo's performance was within the acceptable range of competence. While OLC later withdrew the Bybee Memo, it still approved all of the techniques that had been approved in the Classified Bybee Memo. Indeed, to this day OLC has not publicly said that waterboarding must never be used. The DOJ cannot have it both ways — on the one hand, adopting the reasoning of the Bybee Memo in its briefs filed in federal court and refusing to issue any opinion banning waterboarding or explaining why it is illegal, but, on the other hand, seeking to discipline a lawyer who has taken the same positions.

- In the draft report, OPR applied a heightened standard of professional conduct to Professor Yoo based in part on a "Best Practices Memorandum" drafted by OLC attorneys after Professor Yoo had returned to academia. A basic element of fairness is that one does not apply rules retroactively. There is no basis in the law of professional responsibility to apply ad-hoc "best practices" standards developed *after the fact* to find a lawyer guilty of professional misconduct, especially when those standards do not purport to establish minimum requirements for professional conduct under the relevant ethical rules.

In sum, the OLC memoranda I have reviewed were carefully drafted, necessarily fact-bound, candid, and obviously well-researched. I see no basis for finding that their authors violated any rules of professional conduct because other lawyers, years later, disagreed with the legal conclusions that were expressed.

Sadly, the same cannot be said of the lawyers who wrote the OPR draft report. My assessment of the draft report leads me to believe that the lawyers at OPR may themselves be guilty of disciplinary violations. They have ignored the meaning of the ethics rules and how those rules vary across jurisdictions. They do not seem to be aware that the ethics rules of Pennsylvania, not Washington, D.C., apply. They do not seem to understand that the Pennsylvania Rules have a statute of limitations that passed quite a while ago. They have failed to such a degree to give a fair reading to the Bybee Memo and its caveats that they are likely guilty of either gross incompetence or intentional deception.

If you have further questions, please do not hesitate to contact me.

Sincerely,

Ronald D. Rotunda

Testimony of Michael Stokes Paulsen
Distinguished University Chair & Professor of Law
The University of St. Thomas

before the
Subcommittee on Administrative Oversight and the Courts
of the U.S. Senate Committee on the Judiciary
May 13, 2009

The Lawfulness of the Interrogation Memos

Dear Mr. Chairman and Members of the Committee:

My name is Michael Stokes Paulsen. I have been asked to provide written testimony concerning the lawfulness and propriety of the legal analysis and advice provided by attorneys in the Office of Legal Counsel of the U.S. Department of Justice, to the administration of President George W. Bush, concerning lawful interrogation methods and procedures used against certain high-level al Qaeda terrorists, captured by United States forces, at the direction of President Bush as Commander in Chief, in the course of the war authorized by Congress by the resolution of September 18, 2001. I apologize that I am not able to be there in person to present live testimony, because of scheduling conflicts. I would be happy to provide answers to any written questions that members of this subcommittee (or committee) may have.

I currently hold the position of Distinguished University Chair and Professor of Law at the University of St. Thomas, in Minneapolis - St. Paul, Minnesota, where I have taught for two years. Prior to that, I was McKnight Presidential Professor of Law and Public Policy, Law Alumni Distinguished Professor, and Associate Dean for Faculty Research and Scholarship at the University of Minnesota Law School, where I taught for sixteen years. My areas of primary legal scholarship include Constitutional Law, Separation of Powers, War, National Security, and the Constitution, and Legal Ethics and Professional Responsibility. My academic c.v. is attached.

I have written over sixty academic articles in these fields. Of possible particular interest and relevance are several articles concerning the Constitution's allocation of war and foreign affairs powers: *The Constitutional Power to Interpret International Law*, 118 Yale L. J. 1774 (2009); *The Emancipation Proclamation and the Commander in Chief Power*, 40 Georgia L.

Rev. 807 (2006); *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004); *Youngstown Goes to War*, 19 Const. Comm. 215 (2002). In addition, I note that much of my scholarship concerns more generally the separation of powers and the independent province and duty of the executive branch with respect to constitutional, statutory, and treaty interpretation: *Lincoln and Judicial Authority*, 83 Notre Dame L. Rev. 1227 (2008); *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003); *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337 (1999); *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L. J. 217 (1994): *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 Georgetown L.J. 385 (1994); *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81 (1993). Finally, also of relevance, I have written several articles in the field of legal ethics and professional responsibility, including especially articles concerning the role of attorneys representing the executive branch of the U.S. government, the structure of attorney-client privilege and confidentiality with respect to representation of the U.S. government, and the ethical and professional responsibility duties of government attorneys: *A Constitutional Independent Counsel Statute*, 5 Widener L. Symposium J. 111 (2000); *Nixon Now, supra*; *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 Fordham L. Rev. 807 (1999): *Who "Owns" the Government's Attorney-Client Privilege?* 83 Minn. L. Rev. 473 (1998); *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and its Limits*, 61 Law & Contemp. Prob. 83 (1998).

Prior to becoming a law professor, I served in the United States as an Attorney-Advisor in the Office of Legal Counsel of the U.S. Department of Justice, from 1989-1991, in the administration of President George H.W. Bush. In that capacity, I had the occasion to participate in the research and preparation of dozens of legal opinions, analyses, legislative comments, and other memoranda concerning matters of presidential constitutional power, separation of powers (including war and national security matters), foreign affairs powers, and other matters of constitutional, statutory, and treaty law involving the United States government. At the time, I possessed a Top Secret security clearance. I have not worked for the United States government in any capacity since fall of 1991. While I can state generally that I worked on matters of national security, foreign affairs, war powers, and actions concerning war criminals and terrorists, I retain an ongoing duty of confidentiality and attorney-client privilege with respect to matters in which I was engaged during those years. I am thoroughly familiar with the operations and role of the Office of Legal Counsel as legal counsel to the executive branch of the U.S. government, its customary practices and jurisprudence, its traditions, and its distinctive perspective on matters of constitutional law as attorney for the United States government's executive branch.

In addition to my time as an attorney in the Office of Legal Counsel, I have worked in the Department of Justice as a prosecutor and appellate attorney in the Criminal Division, including an assignment as Special Assistant U.S. Attorney for the Eastern District of Virginia (1985-1986).

I provide this testimony in my personal capacity as a scholar in these areas, and not as a representative of any university institution or on behalf of any client or other organization. The views expressed are my own.

I have attached a copy of my recent article, forthcoming in *The Yale Law Journal*, entitled **"The Constitutional Power to Interpret International Law,"** which in some respects contains more extended discussion and documentation of certain points that I make in more abbreviated form here.

* * * * *

I understand that the premise of these hearings, as suggested by the title selected by the subcommittee majority, is that there exists a need to examine "what went wrong" in the provision of legal advice by attorneys of the Office of Legal Counsel (OLC) of the Department of Justice, in the administration of President George W. Bush, concerning the legal bounds governing the use of certain interrogation methods on captured unlawful (and thus legally "unprivileged") terrorist enemy combatants. In my view, this premise is seriously mistaken. I have studied the legal memoranda in question, drawing on my expertise as a legal scholar whose work over much of the past decade has embraced these types of issues as a major area of research and writing, and on my experience as a government attorney in OLC in the late 1980s and early 1990s. The analysis contained in the memoranda in question is analysis with which, in certain respects, persons of good will can reasonably disagree, but it is well within the range of customary, legitimate, proper, and entirely ethical legal advice that may be provided by confidential legal advisors to the president and his administration. The notion that something "went wrong" in the provision of such legal advice – in any sense other than that some persons now disagree vigorously with the legal analysis and advice in question – is unsound.

In this testimony, I will sketch four brief points.

1. First and most fundamentally, the core legal analysis set forth in the OLC memoranda in question is, in my opinion, not only within the range of legitimate legal analysis and advice but is in fact *substantively correct on the merits.* There exists a basic distinction in the law between what constitutes actual, legal "torture," under applicable standards, and what may be harsh, aggressive, unpleasant interrogation tactics but not, legally, "torture." Reasonable people will come to different conclusions as to where precisely that line is, but the Bush administration's lawyers' ultimate conclusions are certainly defensible. Indeed, I believe they are ultimately correct, both as an abstract, general matter and in their specific application (matters addressed in a variety of separate OLC memoranda).[1] I do not necessarily agree with every particular point, or

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[1] The memoranda to which I refer in this testimony are as follows: Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to John Rizzo, Acting

argument, made in support of OLC's specific statutory-interpretation conclusion. Some sub-issues I would have addressed differently; on some points I would have said more, and on others less. (I say this with some reticence, acutely aware that I speak from a retrospective vantage point that perhaps too easily permits Monday-morning-legal-quarterbacking.) Nonetheless, I believe that OLC's essential statutory conclusion that "torture" refers to a narrow, highly specific subcategory of coercive interrogation techniques, is correct. As a *legal* matter – that is, as a matter of the objective meaning of a particular statutory term-of-art – the term "torture" may differ from, and be more specific than, commonplace or public political usage. That is the distinction that the memoranda draw; and they draw that distinction on the basis of specifically legal analysis.

Moreover, as a matter of constitutional law, the OLC memoranda's most sweeping, categorical, and controversial conclusion – that at all events no statute or treaty may limit the President's sole *constitutional* powers as military" Commander in Chief" to direct and conduct the use of U.S. force – is in my opinion *unquestionably correct.* The Office of Legal Counsel has long and consistently defended the view, both in Republican and in Democratic administrations, that the President's constitutional powers under Article II of the Constitution, as chief executive and as Commander in Chief of the nation's military, afford the President substantial autonomy of action in the areas of the conduct of the nation's foreign affairs and the conduct of war and military actions. These powers, as *constitutional* powers of the President, cannot constitutionally be subject to congressional regulation or control. An act of Congress, or a treaty of the United States, that infringes upon the constitutional powers of the President of the United States is, by definition, unconstitutional, under the straightforward reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Accordingly, it has long been the view of the Office of Legal Counsel that any such enactments cannot legitimately constrain the actions of the President pursuant to his independent constitutional powers; and, further, that such enactments should be interpreted and understood, where fairly possible, to avoid such conflict with the constitutional powers of the President. See, e.g., Memorandum of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel to Abner Mikva, Counsel to the President, *Presidential Authority to Decline to Execute Unconstitutional Statutes* (Nov. 2, 1994).

These are views that should command the respect of all presidential administrations, including the incumbent administration. The Constitution itself prescribes that all presidents

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General Counsel of the Central Intelligence Agency (Aug. 1, 2002); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005). In addition, I am familiar with two other memoranda relevant to these issues. Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General (Dec. 30, 2004) and Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to the Files (January 15, 2009). I am familiar with further memoranda of the Office of Legal Counsel relevant to various issues of war, national security, military force, international law, and treaties that are not directly implicated here.

swear the oath to "preserve, protect and defend" the Constitution. U.S. Const. art. VI, cl.3. It is therefore the duty of all presidents to protect the constitutional powers of the office of President of the United States. It follows that it is likewise the duty of all attorneys representing the executive branch to defend the constitutional powers and prerogatives of the President of the United States.

The constitutional arguments put forward in the OLC memoranda addressing legal standards applicable to interrogation methods are fully in accord with these views, and with the duty of executive branch attorneys to advance them, *and they are in my opinion legally correct.* My most recent academic scholarship includes a lengthy examination of precisely this genus of constitutional issues. See Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 Yale L.J. 1774 (2009) (forthcoming, June 2009). That article sets forth more detailed supporting analysis than is possible to provide here, and I incorporate it by reference for purposes of this testimony. I have provided a copy of that manuscript to the committee to accompany this testimony. I call the committee's attention specifically to pages 1777-1779, 1782-1799, 1824-1828, and 1834-1854, which address both at the general level of constitutional principle and in certain instances at the specific level of contemporary illustration, the points I have outlined in the preceding few paragraphs.

Certain points and arguments advanced in earlier-dated confidential (in fact, classified) OLC memoranda subsequently were withdrawn by Bush administration attorneys in later memoranda intended for public consumption. However, none of the most important, material legal conclusions – and none of the specific legal advice as to the application of such conclusions – was repudiated. Rather, arguments were withdrawn (once memoranda had been leaked publicly) where they were judged unnecessary to the ultimate legal conclusion, politically inappropriate, contrary to subsequently-stated public presidential determinations or proclamations, or for some other unstated reason. In particular, later memoranda declined to rely on the argument that the president retains the constitutional power to make orders to U.S. forces, in the exercise of his sole constitutional power as Commander in Chief, that are (or may be) inconsistent with statutory requirements. This is not because that argument was or is incorrect, but probably because it was unnecessary (and thus impolitic) to rely on such a legal position, given President Bush's stated policy position that the United States had not engaged, and would not engage, in interrogation tactics inconsistent with the statutory prohibition of torture. None of this, in my view, affects the propriety of the constitutional argument as advanced in the earlier memoranda.

2. Second, even if one disagreed with the statutory and constitutional analysis in the OLC memoranda in question, or with the application of that analysis to specific facts, the OLC legal analysis and advice *clearly falls within the range of legitimate legal analysis and the range of reasonable disagreement common to legal analysis of important statutory and constitutional issues.*

Not all lawyers agree on all legal questions. This observation is so obviously true as to be almost trite. Nothing is more common than for lawyers, each acting in entire good faith and employing sophisticated analysis, to reach differing conclusions. (To a certain extent, our entire adversary system of justice is predicated on this commonplace observation, and on the premise that the vigorous debate over the meaning and application of the law, by parties possessing different views and representing different interests, is the best way to provide the dynamic tension that best approximates systemic justice.) One may disagree (as I do) with certain conclusions or arguments contained in some of these memoranda; indeed, one may disagree with the analysis in its entirety. This is not surprising. Quite the contrary, I would be greatly surprised if, on some of these questions, reasonably lawyers did *not* disagree. There is evidence of disagreement within the Bush administration on these legal questions, and the vigorous expression of competing views.

This is probably as it should be. What is *not* legitimate is to assert that every view and legal analysis contrary to one's own is therefore somehow outside the range of appropriate, competent, good-faith analysis. Such an assertion is, in my opinion, simply foolishness – the arrogant projection of one's own political or legal opinions as being so indisputably and universally correct as to brook no dissent. I believe that such a view is dangerous to American political and legal traditions. People disagree. Lawyers disagree on legal questions. With all due respect: to ratchet-up simple disagreement with the legal analysis of a prior administration into the claim that such analysis was beyond the pale of legitimate legal analysis, and therefore should be investigated and punished, is to engage in a mild form of legal neo-McCarthyism.

To be sure, some legal arguments and some "legal" analysis is so far below the standards of competence, plausibility, and good faith as not to be legitimate. But the OLC memoranda in question do not come anywhere near that standard. As noted above, I believe the memoranda's conclusions to be in nearly every respect essentially *correct* as a matter of statutory and constitutional analysis. The quality of the analysis (despite my quarrels with certain points) is clearly well within professional standards. This is not even a close question. There is simply no plausible, objective basis on which it could be said that the legal opinions expressed were illegitimate or unprofessional. There is no plausible basis upon which one could fairly – objectively – conclude that the views expressed are outside the bounds of reasonable professional judgment and legal analysis. If anything, the suggestion that these memoranda lie outside the range of legal advice is *itself* a view of the applicable substantive law, and of the lawyer's professional role, so extreme and unreasonable as not to fall within the range of good-faith, objective, competent legal analysis.

Such views probably more reflect an intense political, *ideological* commitment than true legal analysis. It cannot be doubted that the issues in question raise important questions of morality about which people, quite legitimately, have passionate feelings. But one should never confuse the intensity of one's political passions and commitments with dispassionate analysis of difficult questions of law. If this distinction is observed, it is not possible fairly to assert that the views expressed in the OLC memoranda are outside the range of reasonable, professional legal analysis and advice on the statutory and constitutional questions presented.

3. Third (and in some respects building on the observations just made), it is important to recognize the clear distinction between a lawyer's opinion on questions of *legality* and *endorsement* of a client's actions themselves. The former in no way implies the latter. This is a rudimentary principle of legal ethics, recognized in every bar code of professional responsibility. ABA Model Rule of Professional Conduct 1.2(a) clearly provides that "*a lawyer shall abide by a client's decisions concerning the objectives of representation . . .*". ABA Model Rule 1.2(b) provides that "*[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.*" And ABA Model Rule 1.2(d) further provides that, while lawyers may not counsel clients to engage in conduct they know is illegal, a lawyer "*may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*" It is plain from reading the memos involved that this is exactly what the OLC lawyers were doing – discussing with their clients the legal consequences of what they proposed to do and endeavoring to assist them to ascertain the meaning and scope of the laws and constitutional provisions involved.

Not everything that is legal is a good idea, or good policy, or just, or moral. While a lawyer may in most circumstances add his or her views on such matters as well – matters of policy, propriety, morality, see ABA Model Rule 2.1 – the core of the lawyer's role is to provide objective legal advice that assists a client in understanding the legal options available.

To ignore the distinction between legal advice and moral or political advice is to make an enormous and fundamental category mistake. With respect, the suggestion implied by the subcommittee's stated theme for these hearings – "What Went Wrong" – is precisely such a category mistake. From the standpoint of competing views of policy, propriety, and morality, it may be fair to make an argument that something was "wrong" with the Bush administration's policies in certain respects. From the standpoint of the *lawyering* involved, nothing "went wrong." In my opinion, based on the public record available to me at this date, there is simply no objective basis for any claim that the OLC lawyers in the prior administration engaged in any professional impropriety or unethical conduct whatsoever. They provided fair legal advice to their client, the United States government's executive branch, on important, difficult, and sensitive matters. Disagreement with the underlying *policies* to which that legal analysis was directed is not a fair or legitimate ground upon which to criticize, or impugn the integrity of, the lawyers' analysis.

Indeed, as a matter of legal ethics and a lawyer's professional role, this has matters precisely backwards. A lawyer is not responsible for the policies of his or her client that fall within the bounds of the law. If the objection is in fact really to the policies and practices themselves, the inquiry should be directed to the ultimate policy-makers and decision-makers with respect to interrogation practices. To target Department of Justice legal advisors – and not the ultimately accountable political decision-makers – is to engage in an odd form of political scapegoating that targets the persons whose professional role actually makes them the *least* responsible for the policies or practices at issue.

4. Fourth and finally, as a practical matter, I believe it is both shortsighted and foolish to seek to punish lawyers of a prior administration because of disagreement with the content of their legal advice. In addition to reflecting a basic misunderstanding of lawyers' roles, such an approach unquestionably would have the effect (and probably already has had the effect) of chilling both valuable government service by talented attorneys and the candor, quality, and vigor of the legal advice provided by those who agree to serve as government lawyers in important roles. If a government attorney's legal advice in the service of one administration is subject not only to being reversed in a subsequent administration of different views (as is common, reasonable, and sometimes to be expected), but, further, also made the subject of retrospective investigation, punishment (in various forms), and personal attacks, there is *no question* that the attorney's advice will become more guarded, tepid, inhibited, over-cautious and – in many cases – ultimately unsound. This will be true of Democratic administrations as well as Republican administrations.

The result will be that presidents and administrations of both parties *will not obtain candid, vigorous legal advice reflecting the full range of views*, on sensitive matters of war, foreign affairs and national security. I believe that this will actually be, in subtle but material ways, over the long run, harmful to the national security of the United States. No one in the room (so to speak) will take the hard position – and certainly not commit it to writing. The product will be watered-down legal advice, offered more with a view to how future second-guessers might second-guess it, than with a view to serving the President of the United States, and the nation, as an objective legal advisor.

As noted earlier, I was a line attorney (career civil service) in the Office of Legal Counsel, from 1989-1991. I can state unequivocally, based on my experience, that this phenomenon will occur and will occur quickly. To investigate, and seek to impose political, personal, or other punishment on government attorneys who provide good-faith but controversial legal advice, whenever that advice might become out-of-favor politically, will damage the Office of Legal Counsel, the Department of Justice, and ultimately, the office of President of the United States. And, of course, ultimately, this would damage the interests of the nation that these men and women serve.

Respectfully submitted,

Michael Stokes Paulsen
University Chair & Professor of Law
The University of St. Thomas

Testimony by John Yoo
Professor of Law
University of California, Berkeley School of Law
Visiting Scholar, American Enterprise Institute

Committee on the Judiciary, United States House of Representatives
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

June 26, 2008

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee. I am a professor of law at the University of California, Berkeley, and a visiting scholar at the American Enterprise Institute. From 2001 to 2003, I served as a deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice. During my period of service, I worked on issues involving national security, foreign relations, and terrorism. My academic writing on these subjects can be found in two books, *The Powers of War and Peace* (2005), and *War by Other Means* (2006). The views I present here are mine alone.

As an attorney who has worked for both the legislative and executive branches, I have enormous respect for this Subcommittee's oversight functions and for the importance of cooperation between the executive and legislative branches. At the same time, as an attorney I am bound to honor the confidential and privileged nature of my work for the Department of Justice, as I previously honored the confidentiality of my work for the Legislative Branch. I may discuss my work for the Department only to the extent I am permitted to do so by the Department itself. Accordingly, when Chairman Conyers sent his April 8, 2008, letter inviting me to testify, my attorneys asked the Department of Justice about the appropriate scope of my appearance before the Committee. In response, they received an e-mail from Steve Bradbury of the Office of Legal Counsel of the Department of Justice, dated April 21, 2008. I understand the text of that email previously has been provided to Committee staff.[1]

In brief, the Department of Justice has expressly prohibited me from discussing "specific deliberative communications, including the substance of comments on opinions or policy questions, or the confidential predecisional advice, recommendations, or other positions taken by individuals or entities of the Executive Branch." As I understand this instruction, I cannot share any specific comments, advice, or communications between me and any other specific members of the Executive Branch. The Justice Department, however, has authorized me to discuss "the conclusions reached and the reasoning supporting those conclusions in particular unclassified or declassified legal opinions that have been publicly disclosed by the Department." In this respect, it is my understanding that I may explain and clarify the reasoning in the legal memoranda on which I personally worked while at OLC related to the subject of today's hearing, so long as the memoranda have been made public by the Department of Justice. In addition, "as a special accommodation of Congress's interests in this particular area," the Justice Department has authorized me to discuss "in general terms which offices of the Executive Branch participated in the process that led to a particular opinion or policy decision, to the extent those opinions or policy decisions are now matters of public record." I understand this to allow me to describe which offices within the Executive Branch were consulted or reviewed our opinions in draft form, but not the substance of any input they may have given OLC.

As should be apparent, these instructions, taken together, limit in important respects the matters I properly may discuss before this Subcommittee, and therefore I may not be able to respond to all of the inquiries that you may have today. I, of course, have no authority to resolve any conflicts that may arise between your questions and the Justice Department's orders directing me to safeguard the confidentiality of Executive Branch deliberations. Any such conflicts must be resolved directly between the House and the Executive Branch. But within the constraints I have been ordered to observe, I will strive today to be as helpful as I can to this Subcommittee.

I would like to begin by generally describing OLC and its functions, and the historical context within which these questions arose. The Office of Legal Counsel in the Department of Justice, known as OLC, exists to provide legal advice on the meaning of federal constitutional and statutory law to the Attorney General and other components of the Justice Department, federal agencies, and the White House. The legal issues that concern the Subcommittee today – involving the interrogation of alien enemy combatants—first arose about six months after the 9/11 attacks, in which about 3000 of our fellow citizens were killed in surprise terrorist attacks in New York City and Washington, D.C. Leaders of the Executive Branch as well as members of Congress were deeply concerned that al Qaeda would attempt follow-on attacks, as they did in Europe. In facing these questions in 2002 and 2003, we gave our best effort under the pressures of time and circumstances. We tried to answer these questions as best we could. Certainly we could have used more time to research and draft the legal opinions. But circumstances did not give us that luxury.

Nonetheless, we in OLC were determined, as were all of us in the Justice Department at the time, to interpret the law, in good faith, as best we could under the circumstances. We wanted to make sure that the United States had the ability to defeat this new enemy and to prevent another September 11 attack, and that we did so by operating within the bounds drawn by the laws and Constitution of the United States. Now as then, I believe we achieved this goal.

We reached our conclusions based on the legal materials at hand. These were hard questions, perhaps the hardest that a government lawyer can face. The federal criminal anti-torture law uses words rare in the federal code, no prosecutions had been brought under it, and it had never been interpreted by a federal court. We wrote the memos to give the Executive Branch guidance, not to reach any particular policy result. As you can see from the opinions, we consulted federal judicial decisions in related areas, the legislative history in Congress of the approval of the international instruments and the enactment of the anti-torture statute, even the judgments of foreign tribunals that addressed similar questions. There is certainly room for disagreement among reasonable people, acting in good faith, on these questions. But I still believe we gave the best answers we could on the basis of the legal materials available to us.

It should also be clear, however, that OLC was not involved in the making of policy decisions. OLC interpreted the law, but did not develop or advocate for or against any policy option. To the extent that the United States has successfully prevented al Qaeda from launching another successful terrorist attack on our territory since 9/11, this has been due to the policies chosen by our elected leadership, both those in the Executive Branch who developed and approved them and those in the Legislative Branch who knew of them. I personally believe that the intelligence gleaned by interrogating al Qaeda leaders has contributed significantly to the safety of the American people during these last seven years. When this Subcommittee reviews the development of American policy during this period, I urge it to consider whether alternative policies would have provided the same level of protection to the national security against the al Qaeda threat. But all the same, those policy choices – adopting particular techniques within the lines that OLC had determined to be lawful – were not mine to make and I did not make them. I cannot, therefore, provide the Subcommittee with information about the reasons for particular policy choices. Decisions involving intelligence and covert activity during the time I served in government would have been made by the CIA, the NSC, and the White House. Decisions about interrogation methods at Guantanamo Bay were made by the Defense Department.

Turning to the specifics, during my service at OLC, I was one of five deputy assistant attorneys general who assisted the assistant attorney general for the office. I worked on two matters that have become public and drawn the attention of this Subcommittee. One was a request by the Central Intelligence Agency and the National Security Council for guidance on the rules set by federal criminal law on interrogation of a high-ranking al Qaeda leader, held outside the United States, who was believed to have information that could prevent attacks upon the Nation. The second was a similar question from the Department of Defense on the legal rules on interrogation of al Qaeda members held at Guantanamo Bay who also were believed to have high-value intelligence regarding possible attacks on the United States.

We gave substantially the same advice to both agencies. Both matters at the time were highly classified and the pressures of time and circumstances were high – we received the first request a few months after the September 11, 2001 terrorist attacks on New York City and Washington, D.C. Under those difficult conditions, OLC substantially followed its normal process for writing and researching a legal opinion on a classified matter, including consultation with components of the Justice Department and relevant Executive Branch agencies. We interpreted Congress's statute prohibiting torture as prohibiting extreme acts, as intended by the Executive branch and the Senate at the time that the United States entered the Convention Against Torture. Concerned about potential ambiguity in the statute's terms, we also provided a comprehensive analysis of alternative issues, such as a potential conflict between the Commander-in-Chief and legislative powers in wartime, which might arise if interrogation methods that were ultimately chosen by policymakers were close to or on the line set by the statute.

CIA and NSC Request for Opinion in 2002

Interrogation policy did not arise in the abstract, but in the context of a specific person at a specific point in time. On March 28, 2002, American and Pakistan intelligence agents captured al Qaeda's number three leader, Abu Zubaydah. With the death of Mohammed Atef in the American invasion of Afghanistan in November 2001, Zubaydah had assumed the role of chief military planner for al Qaeda, ranking in importance only behind Osama bin Laden and Dr. Ayman Zawahiri.

It is difficult to understate the importance of the capture. With his new promotion, Zubaydah headed the organization and planning of al Qaeda's operations and its covert cells. With al Qaeda reeling from American success in Afghanistan, and bin Laden and Zawahiri in hiding, Zubaydah took on the role of building and managing al Qaeda's network of covert cells throughout the world. More than anyone else, he knew the identities of hundreds of terrorists and their plans. If anyone had "actionable intelligence" that could be put to use straightaway to kill or capture al Qaeda operatives and to frustrate their plans to murder our citizens, it was Zubaydah. At the same time, Zubaydah was clearly an expert at resisting regular interrogation methods.

OLC was asked to evaluate the legality of interrogation methods proposed for use with Zubaydah. While the subject matter was certainly extraordinary and demanded unusually tight controls because of its sensitivity, the question of the meaning of the federal anti-torture law was handled in the same way that other classified OLC opinions are handled. These opinions did not receive the broad dissemination within the government that would normally occur with a memorandum opinion. But this was because the question of interrogation involved national security and covert action and was classified at a top secret level. Nonetheless, the process that governed the research, writing, and review of these memos was in line with that which occurs with opinions on other classified, sensitive issues.

In particular, the offices of the CIA general counsel and of the NSC legal advisor asked OLC for an opinion on the meaning of the anti-torture statute. They set the classification level of the work and dictated which agencies and personnel could know about it. In this case, the NSC ordered that we not discuss our work on this matter with either the State or Defense Departments. The Office of the Attorney General was promptly informed of the request and it decided which components within the Justice Department were to review our work: these were the offices of the attorney general, the deputy attorney general, and the criminal division. The Office of the Attorney General also selected the Justice Department staff who could know about the request. Within OLC, career staff handled the initial research and drafting of the opinion. It was edited and reviewed by another deputy assistant attorney general. It was then reviewed, edited, and re-written by the assistant attorney general in charge of the office at the time, as is the case with all opinions that issue from OLC.

The Office of the Attorney General was also actively involved in reviewing OLC's work. Not only did OLC brief the Office of the Attorney General several times about the legal opinion, but the Office of the Attorney General made edits to the opinion, and even worked on it with OLC staff in our offices, up until the very minute the opinion was signed. We also sent drafts of the opinion to the deputy attorney general's office and to the criminal division for their views and comments. No opinion of this significance could ever issue from the Justice Department without the review of, and the approval of, the Office of the Attorney General.

We also sent the opinion in draft form to the office of the CIA general counsel, the office of the NSC legal advisor, and the office of the White House counsel for their review, as would normally be the case with any opinion involving intelligence matters. As with any opinion, OLC welcomed comments, suggested edits, and questions.

I should emphasize that our work on this issue was with regard to Zubaydah. It was not conducted with regard to Iraq, nor did it have anything to do with the terrible abuses that occurred at the Abu Ghraib prison more than a year and a half later. In fact, the legal regimes governing the war with al Qaeda and the war with Iraq were utterly different. The Geneva Convention provided the relevant rules for the war in Iraq. After extended debate, however, the Bush Administration concluded in February 2002 that al Qaeda prisoners were not covered by the Third Geneva Convention, which establishes the rules governing the treatment of prisoners of war. Al Qaeda was not a state party to the treaty nor has it shown any desire to obey its rules in this war. Therefore, in our view at the time, the Geneva Conventions did not govern the legal regime that applied to the interrogation of al Qaeda terrorists.

What federal law commands is that al Qaeda and Taliban operatives not be tortured. Specifically, the federal anti-torture law makes clear that the United States cannot use interrogation methods that cause "severe physical or mental pain or suffering." No one in the government, to my knowledge, questioned that ban—then or now. In fact, the very purpose of seeking legal advice was to make sure that the government did not do anything that would violate this federal law. As we examined that legal question in the particular, narrow context in which it arose, we believed that the application of the legal standard set by Congress—barring any treatment that caused severe physical or mental pain or suffering—would depend not just on the particular interrogation method, but on the subject's physical and mental condition. In the particular context that we faced—Zubaydah, the hardened operational leader of al Qaeda, and perhaps others similarly situated—we did not believe that the coercive interrogation methods being contemplated transgressed the line that had been prescribed by Congress. I personally do not believe that torture is necessary or should ever be used by the United States. Nor do I believe that OLC's August 1, 2002 memorandum authorizes such a result.

It also should not go unmentioned that the importance of appropriately questioning Zubaydah—*i.e.*, of permitting our Nation to use certain coercive techniques within the bounds of the law—was demonstrated by the string of successes for American intelligence that occurred in the months after his capture. These have been widely reported. A year to the day of the September 11 attacks, Pakistani authorities captured Ramzi bin al Shibh. Bin al Shibh was the right hand man to Khalid Shaikh Mohammed, referred to by American intelligence and law enforcement as "KSM." A 30-year-old Yemeni, bin al Shibh had journeyed to Hamburg, Germany, where he became close friends and a fellow al Qaeda member with Mohammed Atta, the tactical commander of the 9/11 attacks. Hand-picked by Osama bin Laden to join the 9/11 attackers, bin al Shibh's American visa applications had been repeatedly rejected. He continued to serve as a conduit for money and instructions between al Qaeda leaders and the hijackers. He was the coordinator of the attacks.

Another six months later, American and Pakistani intelligence landed KSM himself. Labeled by the 9/11 Commission Report as the "principal architect" of the 9/11 attacks and a "terrorist entrepreneur," KSM was captured on March 1, 2003 in Rawalpindi, Pakistan. The uncle of Ramzi Yousef, who had carried out the first bombing of the World Trade Center, KSM had worked on the foiled plan to bomb twelve American airliners over the Pacific. It was KSM who met with bin Laden in 1996 and proposed the idea of crashing planes into American targets. He helped select the operatives, provided the financing and preparation for their trip to the United States, and continued to stay in close contact with the operatives in the months leading up to 9/11. After the U.S. invasion of Afghanistan and the capture of Zubaydah, KSM became the most important leader after bin Laden and Zawahiri.

According to public reports, these three seasoned al Qaeda commanders provided useful information to the United States. Not only did their captures take significant parts of the al Qaeda leadership out of action, they led to the recovery of much information that prevented future terrorist attacks and helped American intelligence more fully understand the operation of the terrorist network. One only has to read the 9/11 Commission report to see the large amounts of information provided by the three.[2] Indeed, government officials have said publicly that these operations have allowed the government to stop attacks on the United States itself.

Revised 2004 OLC Opinion on Interrogation

At the end of 2004, well after I had left the Justice Department, OLC issued a revised opinion on some of the matters covered by OLC's 2002 memorandum. The 2004 opinion replaced the 2002 opinion's definition of torture. The 2004 memo said that torture might be broader than "excruciating or agonizing pain or suffering," using words not much different from the anti-torture statute itself. It then proceeded to list acts that everyone would agree were torture. The 2004 opinion did not provide as precise a definition of the law as the 2002 opinion. Though it criticized our earlier work, the 2004 opinion included a footnote to say that *all* interrogation methods that earlier opinions had said were legal, *were still legal.* Interrogation policy had not changed. The 2004 opinion also followed the 2002 opinion's distinction between torture and cruel, inhuman, and degrading treatment, and agreed that federal criminal law prohibited only the former. It agreed that "torture" should be used to describe only extreme, outrageous acts that were unusually cruel.

The 2004 opinion also omitted a discussion in the 2002 opinion on the scope of the President's Commander-in-Chief power and possible defenses should the statute be violated. Let me be clear that the 2002 opinion did not include this discussion because we wanted to condone any violation of federal law. Federal law prohibits the infliction of severe physical or mental pain or suffering. As government lawyers, our duty was to interpret the laws as written by Congress. There is no doubt that these were and are very difficult and close questions, made all the harder because of the lack of any authoritative judicial interpretation. Indeed, it was precisely because some might later deem a particular interrogation technique to be "close to the statutory line" that OLC believed in 2002 that it was necessary to consider all potential legal issues, including the independent constitutional powers of the President. Conversely, by finding the *same* interrogation techniques *wholly legal* without regard to any independent authority that the President might have in this area under the Constitution, the 2004 opinion necessarily found the statutory questions far easier than OLC had believed it to be in 2002.

Request from the Defense Department

Let me turn now to the second opinion request I mentioned earlier—the one OLC received from the Department of Defense, which dealt with potential interrogation methods for high-value al Qaeda members being held at Guantanamo Bay.

Interrogation methods at Guantanamo Bay were the result of a careful vetting process through a Defense Department-wide working group. In 2003, the DOD Working Group considered the policy, operational, and legal issues involved in the interrogation of detainees in the war on terrorism, and the DOD General Counsel's office requested an opinion from OLC on certain of the legal standards that would govern the interrogation of al Qaeda terrorists held at Guantanamo Bay. Our inquiry was limited to the potential application of federal criminal law. It did not analyze any issues that might arise in Guantanamo under military law, as DOD reserved analysis of those issues for itself.

Just as we had with the request from the CIA/NSC in 2002, OLC notified the components in our chain of command within DOJ about DOD's request for an opinion. As in 2002, OLC circulated drafts of the proposed opinion to the Offices of the Deputy Attorney General, the Attorney General, and the Criminal Division. The process of researching, drafting, and editing within OLC and within the Justice Department was the same as with the 2002 opinion. Although the Working Group did not know of the CIA/NSC 2002 request for similar advice, our 2003 opinion would be substantially similar to our August 2002. In fact, it had to be if OLC were to follow its own internal precedent. I met with the working group, composed of both military officers and Defense Department civilians, to discuss legal issues. Our final opinion was delivered to DOD on March 14, 2003.

That April, the Working Group issued a report that incorporated sections of OLC's opinion as part of a broader analysis of the legal and policy issues regarding interrogations at Guantanamo Bay. The Working Group, after carefully considering all the issues, approved a set of 26 well-known tactics in oral questioning while reserving anything more aggressive for use only on specific detainees with important information subject to senior commander approval. It required that any interrogation plan take into account the physical and mental condition of the detainee, the information that they might know, and environmental and historical factors. It reiterated President Bush's 2002 executive order that all prisoners be treated humanely and consistent with the principles of the Geneva Conventions. The Working Group report also outlined the potential costs of exceptional interrogation methods—loss of support among allies, weakened protections for captured U.S. personnel, confusion among interrogators about approved methods, and weakening of standards of conduct and morale among U.S. troops.

As it turned out, it appears that the Secretary of Defense refused to authorize these exceptional interrogation methods for Guantanamo Bay with the sole exception of isolation. The Secretary struck out the use of blindfolds and even mild, non-injurious physical contact from the list of conventional interrogation techniques. I repeat—of the exceptional methods, it appears that the Secretary of Defense authorized only one: isolation. He allowed it only if it generally would not be longer than 30 days. That was it. He never approved any use of dogs, physical contact, slapping, sleep deprivation, or stress positions.

Let me be clear, again, that we in OLC never proposed or selected any specific interrogation methods, either for the CIA or DOD. These difficult decisions were the province of the policymakers. But, again, judging from published reports of our intelligence successes, it appears clear those decisions almost certainly thwarted near terrorist attacks upon our citizenry.

In closing, I believe that it is important to avoid the pitfalls of Monday morning quarterbacking. It may seem apparent today–at least to some—that other choices would have led to better outcomes, though I am not so sure. In facing the questions that were posed to us, we appropriately kept in mind that the homeland of the United States had been attacked by a dangerous, unconventional enemy. But we did not make policy, and we called the legal questions as we saw them. There is little doubt that these are difficult questions, about which reasonable people can differ in good faith. Yet, the facts remain that the United States has successfully frustrated al Qaeda's efforts to carry out follow-on attacks on the Nation, and that the interrogation of captured al Qaeda leaders have been a critical part of that effort. It may be convenient to criticize those of us who had to make these difficult decisions, but it is an important exercise to ask whether others would truly have made a different decision, under the circumstances that existed in early 2002 and early 2003—and whether, if they had, the Nation would have been as successful in averting another murderous attack upon our citizens.

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[1] The email guidance reads:

> The Department of Justice does not object to Prof. Yoo's appearance before the House Judiciary Committee to testify on the general subjects identified in the letter to him of April 8, 2008 from Chairman Conyers, subject to the limitations set forth herein. Specifically, the Department authorizes Prof. Yoo to respond to questions in the following manner: He may discuss the conclusions reached and the reasoning supporting those conclusions in particular unclassified or declassified legal opinions that have been publicly disclosed by the Department (such as the unclassified August 1, 2002 opinion addressing the anti-torture statute, the published December 30, 2004 opinion addressing the anti-torture statute, and the declassified March 14, 2003 opinion to the Department of Defense addressing interrogation standards). As a special accommodation of Congress's interests in this particular area, he may discuss in general terms which offices of the Executive Branch participated in the process that led to a particular opinion or policy decision, to the extent those opinions or policy decisions are now matters of public record. He is not authorized, however, to discuss specific deliberative communications, including the substance of comments on opinions or policy questions, or the confidential predecisional advice, recommendations, or other positions taken by individuals or entities of the Executive Branch.

[2] Most of the details of the formation and execution of the 9/11 attacks are directly attributed in the Commission Report's text and footnotes to their interrogations. See the note on Detainee Interrogation Reports in The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attakcs Upon the United States 146 (2004).